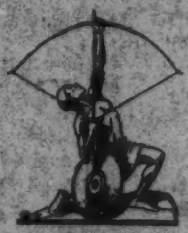
BOSTON UNIVERSITY

Public Utilities FORTNIGHTLY



July 6, 1939

FEDERAL COMPETITION MAY BE UNCONSTITUTIONAL—BUT?
Article I.
By William M. Wherry

« »

The Forgotten Public
By William Starr Myers

« »

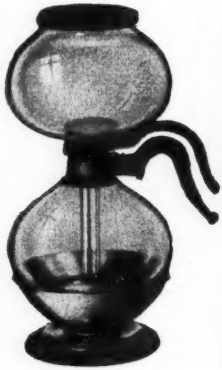
No Hard and Fast Rules for Depreciation Reserves
By Edwy L. Taylor 78

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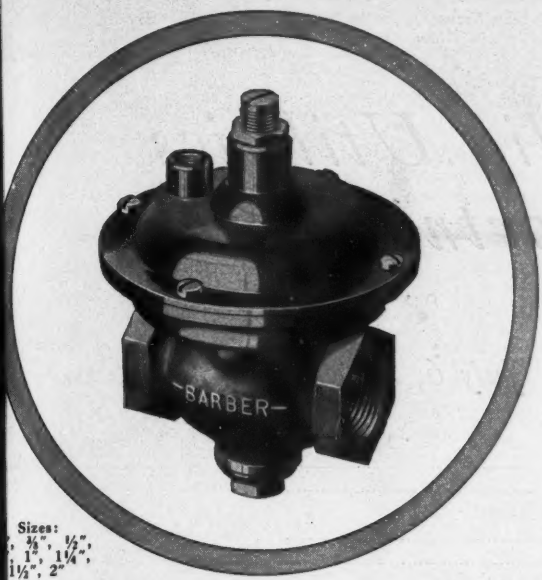
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Public Utilities Fortnightly

VOLUME XXIV *July 6, 1939* NUMBER 1

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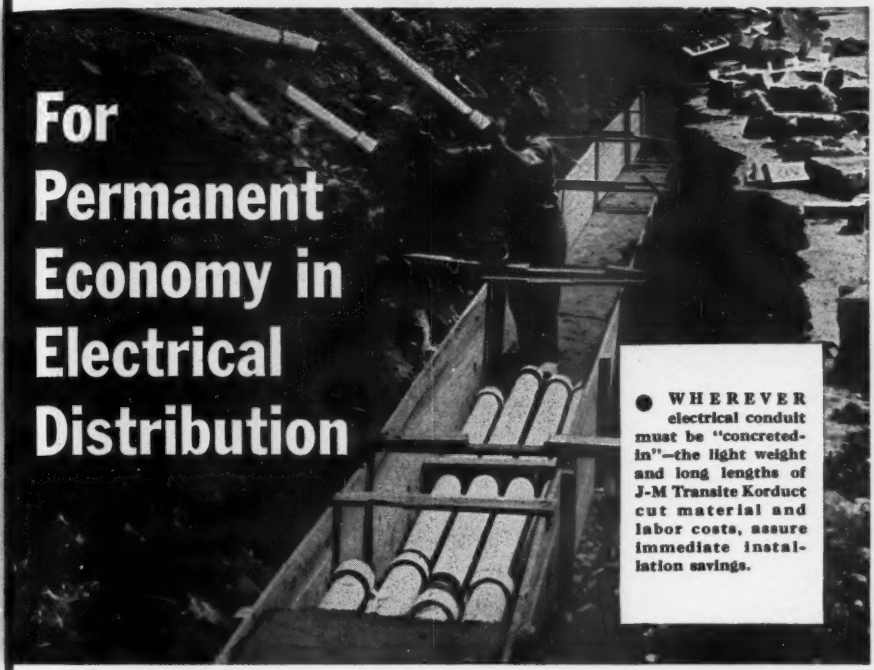
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¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

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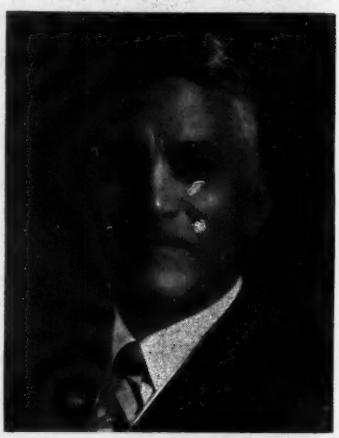
Pages with the Editors

IT is an interesting change if not a relief to see that reform criticism at Washington has shifted, for the time being, from the profit system to the equally long-established wage system of American industry. A special subcommittee of the Senate Finance Committee recently concluded that "wages will never settle the labor problem," and urged that we should "blend the wage scale with a profit-sharing differential."

OF course, that is easier said than done. Past performance may raise doubt that organized labor leaders would be very enthusiastic about plumping for a set-up which might make the workers more sympathetic with the problems of management and relatively less concerned with the social ambitions of labor unions. For the utility industries, however, the suggestion that labor might be willing to take the bitter with the sweet, if it could participate on a quasi partnership basis with the industrial stockholders, is worthy of special consideration.

FIRST of all, utility employment is, on the average, more stable and its earnings are less subject to abrupt business swings of unregulated competitive industry. This means that a profit-sharing wage plan could perhaps be more easily established in the utility field than in some of the more seasonal or volatile trades. Again, in the utility business there has already been some successful experimentation in profit sharing with the consumers (exemplified in the Washington plan, Detroit plan, etc.). Employee profit sharing would thus seem to be only an extension of a known principle into a new field. Finally, some utility organizations have in the past tried to enlist worker interest through the encouragement of employee stock ownership—a plan which has not escaped criticism, especially from organized labor.

NOTHING definite has been done about this idea in the utility field. These comments are merely prompted by the recent criticism of the Senate subcommittee. However, on the general (and timely) subject of settling disputes between utility and labor, we have in this issue an article by a noted scholar of political economy, WILLIAM STARR MYERS, professor of politics at Princeton University. DR. MYERS was born in Baltimore and re-



EDWY L. TAYLOR

There is utility weakness in the maintenance of less than adequate depreciation reserves.

(SEE PAGE 18)



Oren Jack Turner

WILLIAM STARR MYERS

A utility must serve a trinity of public interest: The consumer, the worker, and the stockholder.

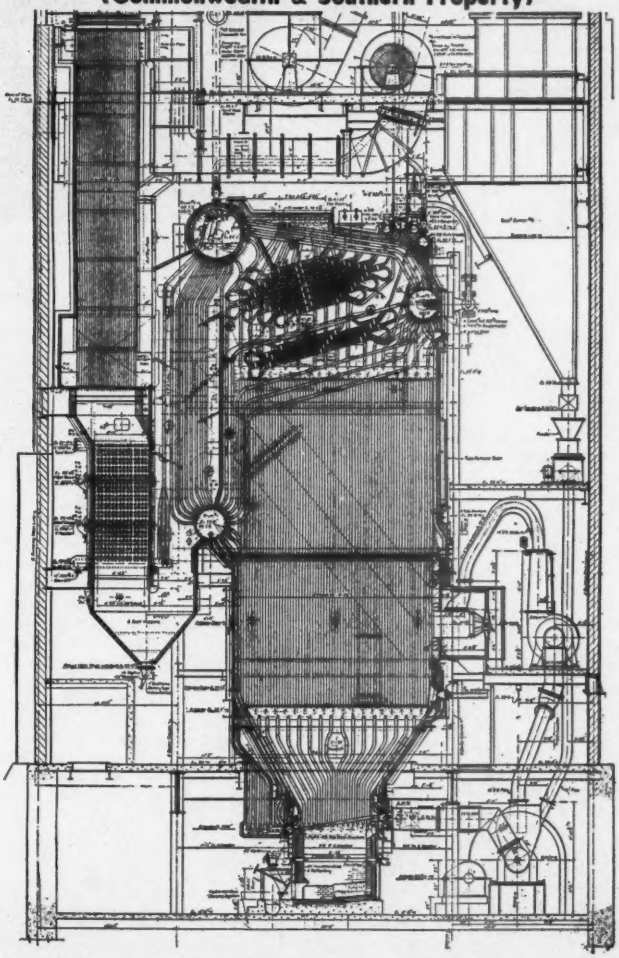
(SEE PAGE 13)

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ceived his Ph. D. at Johns Hopkins University in that city in 1900. Following teaching at Gilman School, also in Baltimore, he succeeded to his present faculty position in 1918. He is widely known for his writings in the general field of political and social economy.

ANOTHER noted author, who is a contributor to this issue of the FORTNIGHTLY, is WILLIAM M. WHERRY of the New York bar, whose book entitled "Public Utilities and the Law" (1925) occupies a place on the library shelves of most lawyers and regulatory officials who work constantly in utility practice. MR. WHERRY was born in New York in 1878, and after receiving his B. S. from the University of Michigan ('98) pursued his legal studies at Cincinnati Law School and Columbia University. The article, which appears in this issue, is the first instalment of a critical analysis of Federal competition in the field of private enterprise.

SPEAKING of specialists in utility law reminds us that about the time this issue is distributed, the American Bar Association will be meeting for its sixty-second annual convention in San Francisco. In connection with this conclave, there will be three sessions of the association's Section of Public Utility Law held at the Palace Hotel in San Francisco on the afternoon of July 10th, and the morning and afternoon of July 11th, respectively. It is expected that the text of the addresses at this session, always of great interest to those concerned with the problems of utility regulation, will be subsequently reprinted in the FORTNIGHTLY, as has been our custom for the past five years.

ANOTHER article in this issue is an analysis of the recently filed final report of the Federal Communications Commission by a member of our own editorial staff, FRANCIS X. WELCH (page 27). Judging by the headlines it would appear that the FCC is making more hot weather news in Washington these days than the other regulatory commissions put together. Of course, some of this is news which the FCC would be just as pleased not to be making, such as the outbreak over the alleged censorship attempt on the international radio broadcast regulation, and the FCC's troubles with Congress over renewing its annual appropriation.

AMONG the important discussions contained in the final report of the FCC was the subject of utility depreciation. We present in this issue an article on this general subject, written in nontechnical fashion by EDWY L. TAYLOR, who has served on the Connecticut Public Utilities Commission for the past eight years. Perhaps the most surprising feature about COMMISSIONER TAYLOR'S article is that it mentions neither the straight line nor sinking fund methods of computing depreciation. It does stress, however, the viewpoint that the treatment of commercial risk in the utility investment is separate from this depreciation and that there is much danger of weakening utilities through the maintenance of less than adequate depreciation reserves.



WILLIAM M. WHERRY

We may never know whether Federal competition with private industry is constitutional or not.

(SEE PAGE 3)

COMMISSIONER TAYLOR was born in Albany, N. Y., in 1879. He received two degrees in civil engineering at Yale University and after a period of teaching, spent twenty-five years in various departments of the railroad service traveling through every state and throughout Canada and Alaska. In the World War he served in the U. S. Army Engineer Corps and now holds a reserve commission of lieutenant colonel. He was appointed to his present post by Governor Cross from a position in the banking field.

IMPORTANT decisions preprinted from *Public Utilities Reports* may be found in the back of this issue.

THE next number of this magazine will be out July 20th.

The Editors

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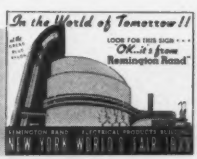
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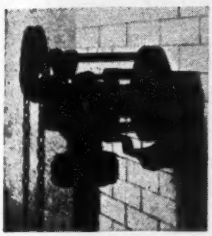
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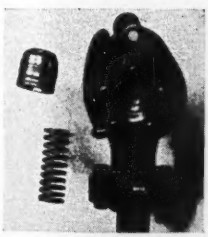
PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 193–256, from 28 P.U.R.(N.S.)



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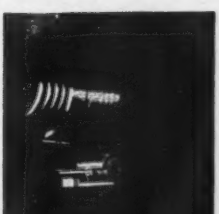
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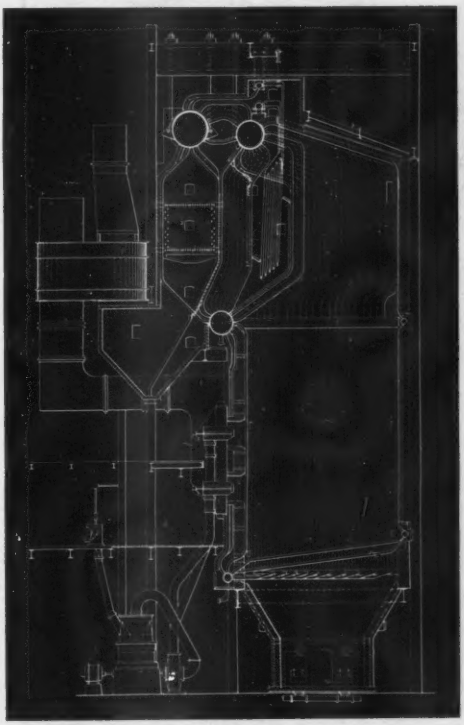
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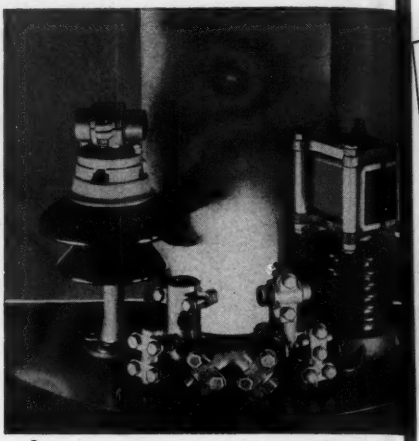
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GREENSBURG, PA.
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CHLORIDE
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Unsurpassed for Any Stationary Service

THE great number of public utility and private industrial plants that are using Exide Chlorides for control bus, exciter, telephone and similar services, proves conclusively that in the opinion of plant engineers these batteries are unsurpassed for stationary service.

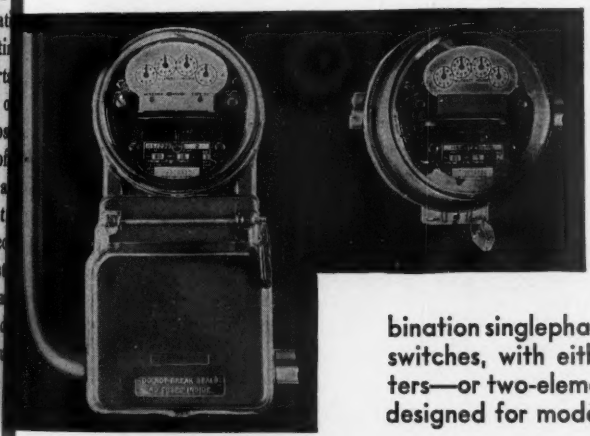
Bulletin 204 describing these batteries—their unique Manchester positive and Box negative plates—is yours for the asking. Write for a copy today.

THE ELECTRIC STORAGE BATTERY COMPANY

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Sangamo modern meters, whether singlephase watthour meters—combination singlephase watthour meters and time-switches, with either single or two-rate registers—or two-element watthour meters—all are designed for modern "A" and "S" mountings.

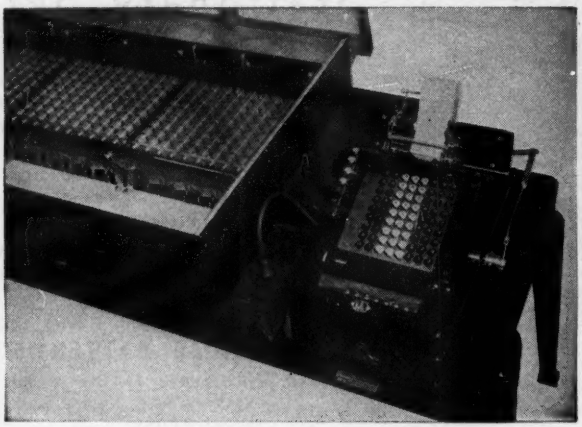
Modern Meters for Modern Loads!

SANGAMO ELECTRIC COMPANY
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Rate Changes!

THE ONE-STEP METHOD



OF BILL ANALYSIS

R & S Bill Frequency Analyzer: developed for our Utility Rate Service. The kw.-hrs. billed are entered on the adding machine keyboard. A tape is prepared of all items and a consumption total accumulated which serves as a control. At the same time—through this *single* operation—the bill count for each kw.-hr. step is made by the electrically controlled accumulating registers.

Continued rate changes—checking load-building activities—need for current customer usage data—all are reasons why many companies are using R & S ONE-STEP SERVICE for analyzing information required in productive rate making. Monthly or annual bill frequency tables now produced in a few days instead of weeks and months.

Estimates promptly submitted. Such marked savings that analyses now can be carried on currently for much less than former cost of periodic studies.

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CHEVROLET'S TRUCK LINE is a Fleet in Itself

Choose from its 47 models, on nine wheelbases, the truck best suited to your needs

he wide margin by hich Chevrolet leads l other makes of motor ucks in *sales* is also a rect measure of Chev- let's leadership in *lue*—for trucks are ought by business men ho are intent, first of all, on tting the best return on eir investment. More and ore, they are finding that hevrolet trucks *pay*—in economy, effi- ency and durability. . . . This year, to a greater extent than ever before, Chevrolet's wide variety of trucks—47 models, nine wheelbases —makes the advantages of Chevrolet transportation available to the great majority of business and industrial uses. This variety of models, and their versatility that fits them to so wide a range of uses, also account for a large part of Chevrolet's predominant sales leadership.

CHECK—AND TRIPLE-CHECK —CHEVROLET TRUCKS FOR *Value Variety Versatility*

CHEVROLET MOTOR DIVISION, *General Motors Sales Corporation*, DETROIT, MICHIGAN
General Motors Instalment Plan—convenient, economical monthly payments. A General Motors Value.

DESIGNED FOR THE LOAD CHEVROLET POWERED FOR THE PULL

MASSIVE NEW SUPREMLINE TRUCK STYLING . . . COUPE-TYPE CABS . . . VASTLY IMPROVED VISIBILITY • FAMOUS VALVE-IN-HEAD TRUCK ENGINE • POWERFUL HYDRAULIC TRUCK BRAKES (Vacuum-Power Brake Equipment optional on Heavy Duty models at additional cost) • FULL-FLOATING REAR AXLE on Heavy Duty models only (2-Speed Axle optional on Heavy Duty models at additional cost)

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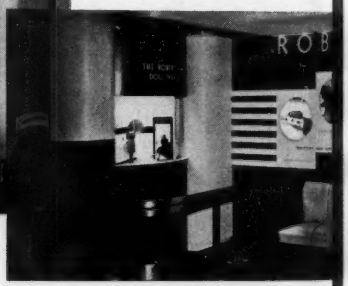
At the New York World's Fair

THE ROBERTSHAW DOLL THEATRE SELLS MODERN GAS RANGES FOR YOU!



"But, my dear, **HOW** *do you* **FIND THE T-I-M-E?"**

"Why, I've a **ROBOT** *working for me!"*



They're hearing it now—those crowds that are flocking to the New York World's Fair. They're hearing the dramatic story of modern progress in terms of the modern gas range. And they're going back home determined to get their share of the World of Tomorrow—*today*.

The Doll Theatre at the Fair is just one more means for Robertshaw to carry to the millions the stirring message of automatic heat control, to fix in their minds the Robertshaw dial as a definite symbol of gas range excellence, to make it easier for you to sell Robertshaw-equipped ranges.

ROBERTSHAW
THERMOSTAT COMPANY
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HELP YOUR SALESMEN!... ***Put this radically new kind of sales manual in their hands. We supply it*** **FREE**



"More Income" is geared to today's selling needs, marks an entirely new approach to gas range promotion, brings a wealth of new facts, new ideas, new methods to the salesman's finger-tips. Hardly off the press, "More Income" has already evoked an amazing response, has brou enthusiastic cheers from even t most successful salesmen. Howma copies do you need for your sta

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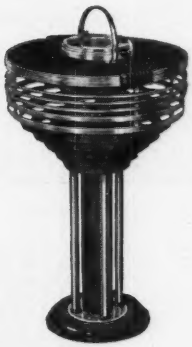


Kisco's New CIRCULAIR

The Most Sensational Cooling Device Since the Invention of the Electric Fan. Distributes Cool Air in All Directions . . . . *right now!*

Cool air in the room is drawn from the lower levels and recirculated upward and outward throughout the room without drafts or blasts . . . without danger of summer "fan colds."

The "Senator" Model shown is fitted with disappearing ash smoker tray and wide service tray with alcohol-proof top.



At last! Quiet, Safe, Draftless Ventilation! This powerful Kisco Cool Air Recirculator can be used anywhere.

The Cool, Low air is drawn up from the floor and distributed outward over a wide area, providing constant recirculation. Floor models, desk models, and ceiling fixtures to choose from.

DEFINITE LOAD BUILDERS!

The Complete Kisco Line of Tailor Made Ventilation

New Circulair and Cool-CIRCLE-Ator units—Exhausters—Attic Ventilators. Built up to quality, sold on actual air deliveries instead of inches. Sizes from 16 to 42″, including direct motor and belt driven exhausters. Designed for effective, quiet air movement.

"There's Money in Circulation for You"

WRITE FOR YOUR COPY OF THIS NEW CATALOG FOLDER

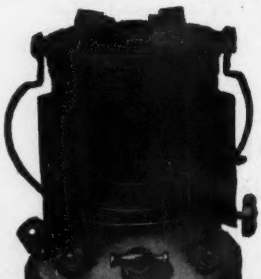
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39TH & CHOUTEAU ST. LOUIS, MO.

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+ up-to-date design
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★ ★ PRODUCTS
THE SUPERIOR SWITCHBOARD & DEVICES CO.
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METER & TRANSFORMER ENCLOSURES



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DREADNAUGHT
Splicers' Furnace

Designed and built for
PUBLIC UTILITY SERVICE

- EXTRA WIDE TANK
- HINGED FLUE
- HEAVY BURNER WITH
- REMOVABLE JET BLOCK
- KEROSENE OR GASOLINE

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25 BILLS AN HOUR

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YPEWRITER
OU CAN WRITE

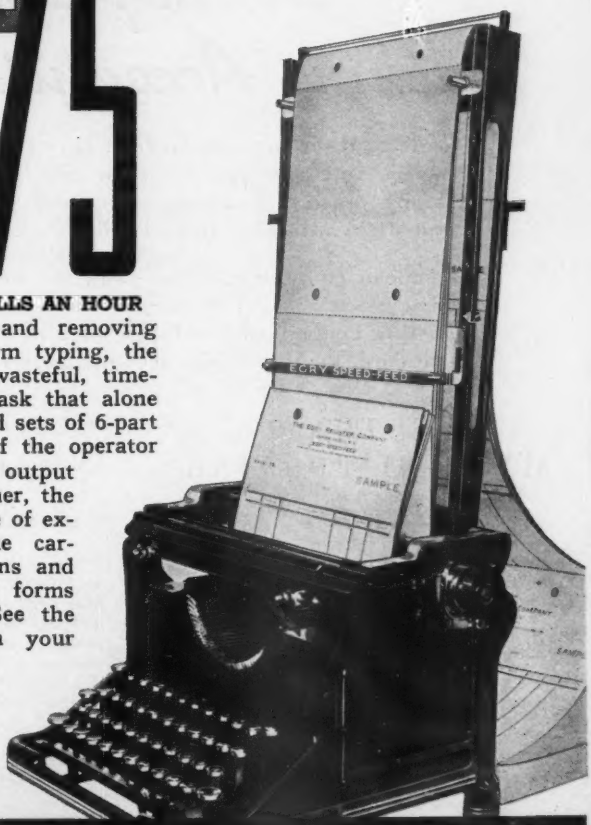
35 BILLS AN HOUR

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TYPEWRITER
US A
SPEED-FEED
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75 BILLS AN HOUR

In one minute the Egry Speed-Feed instantly converts any typewriter into a practical billing machine, without change in typewriter construction or operation. So easily and quickly removed, it does not interfere with the use of the typewriter as a correspondence machine. No tools are required—no screws, nuts or bolts—it requires but an instant to attach or detach the Speed-Feed.

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EGRY SPEED-FEED

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Watch out for dog-eared forms. They are a sure sign of poor paper. And poor paper means smudgy, illegible typing; sloppy erasures; sagging, crumpled, hard-to-file forms and sticky, drooping index cards.

You can end these faults — and the mistakes and inefficiency that go with them — by making Weston's Machine Posting Ledger and Weston's Machine Posting Index your standards for all machine accounting forms and index cards.

WESTON'S MACHINE POSTING *Ledger*

Made especially for machine bookkeeping in Buff, White, Blue and Pink in subs. 24, 28, 32 and 36. Has 50% rag content for strength and durability and a perfect surface for smudge-proof typing, easy filing, clean erasing; and a one-way grain direction that makes forms stand straight in trays or binders. Moderately priced.

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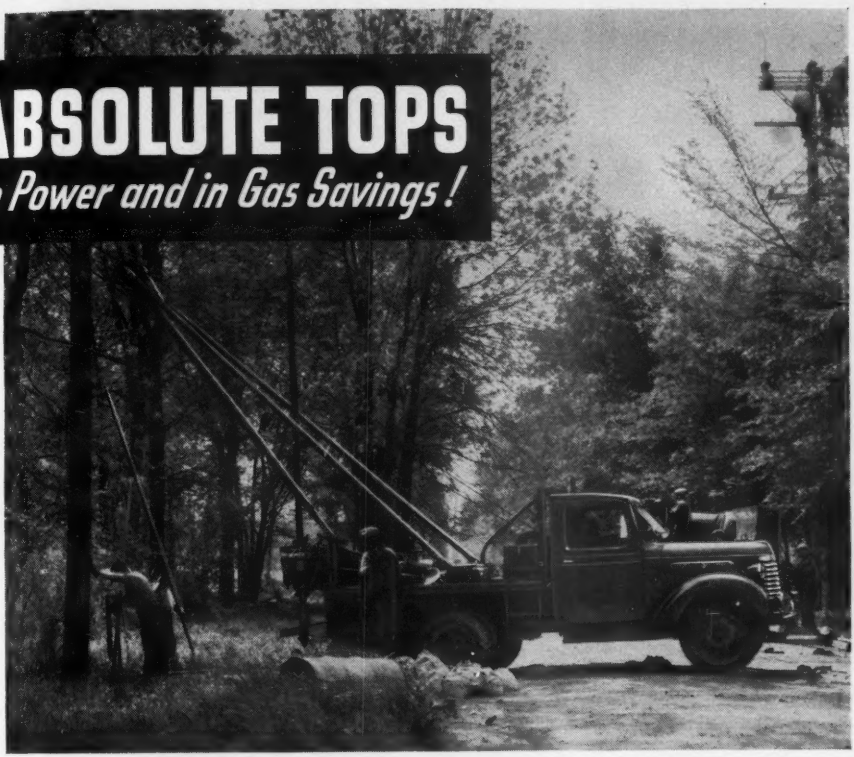
Made in Buff, White, Blue, Ecru, Salmon and P in 180M, 220M, 280M and 340M—basis 25½x3 Has a ledger finish that takes typing clearly; not smudge and can be erased repeatedly. E strength and snap make index tabs stand without bending or tearing. WINCHESTER INDEX comes in the s weights and colors at the same price.

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WESTON'S PAPER

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• *THE TRUCK OF VALUE* •

General Motors Trucks top them ALL—with more power *in every model* and with higher mileage per gallon of gas! GMC's "walk away" with *any* load, light or heavy. And GMC's return from every trip with more gas left in their tanks than other trucks working under like conditions. Why, you ask, can a GMC *DO* more and *SAVE* more? It's simple. GMC's SUPER-DUTY valve-in-head engines pack more driving punch because of exclusive POWER-PAK pistons operating under new-design combustion heads. *DRIVE* a GMC—see how it *pulls*—and *measure the miles per gallon!* You'll be *convinced!*

CHECK GMC PRICES AGAINST THE LOWEST!

Our own YMAC Time Payment Plan assures you of lowest available rates

GMC TRUCKS TRAILERS - DIESELS

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A REAL TRIUMPH

MAGIC* MARGIN

EXCLUSIVELY ROYAL

TRADE MARK



TO WIN AND HOLD FIRST PLACE in the preference of American typists and executives requires exceptional performance . . . a distinction long enjoyed by the Easy-Writing Royal Typewriter. And now, Royal's New No. 1 presents MAGIC Margin, a sensational improvement which eliminates the setting of margin stops by hand. Typing is made easier for every operator and better letters are written faster. The merits of MAGIC Margin, as well as many other Features of the Future, are attracting more and more users to Royal, ever building higher and higher sales figures. Give Royal THE DESK TEST. In your office with your own operators . . . Compare the Work.

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More than ever ROYAL WORLD'S No. 1 TYPEWRITE

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FIRST LINE OF DEFENSE

TO SAFEGUARD PROFITS !



C-B 14 standard aluminum meter enclosure for outdoor and indoor new sequence metering.

Don't let current diversion continue to cut into earnings! Lick this problem for all time with C-B tamper- and alteration-proof New Sequence Service Entrance Equipment, and prevent revenue losses. But C-B equipment does more than stop diversion. It modernizes every meter installation; places the meter in a position of high visibility, where it can be read quickly; sharply reduces installation time and labor; gives extra years of trouble-free service. The cost? Only a fraction of the current diversion losses themselves. Consult the utility trained C-B technical staff without obligation.

C-B Catalogues 57, 58A, 61, 62 and 63 are of interest to every utility executive. Copies for the asking.

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CORCORAN-BROWN LAMP DIVISION

THE ELECTRIC AUTO-LITE COMPANY

4900 Spring Grove Avenue Cincinnati, Ohio

Dig You Must!

Before You Lay the Pipe

CLEVELANDS



Dig Anywhere—Anytim

AT LEAST COST

"Clevelands" are the "working equipment you ever saw or used. H is real trenching performance of highest type. Time-tested, time-pro wheel type full crawler design is bac by sound engineering and solid qua all the way through.

Compact, yet rugged, with superflu weight eliminated and amply powe for the toughest tasks in any type of "Clevelands" speed up every operat incidental to mechanical trenching deliver maximum performance whet the jobs are in the close confined ar of city and suburbs or on main lines open country. Easy to operate and tra port (on specially built trailers) "Clevelands" fit into more jobs and redu trenching costs to the minimum.

You take no chance on "Clevelands" for they are sold on a guaranteed satisf tion basis. Write today for details.

THE CLEVELAND TRENCHER COMPANY

"Pioneer of the Small Trencher"

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Another Big Time Saving "Cleveland" feature—Truck speed transportation on Special Trailer. "Clevelands" load or unload in 10 to 15 minutes.

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ANNOUNCE TYPE "T"

YOU OWE YOUR MEN
THE BEST THERE IS

FASTER—BETTER LINE REPAIRS

NO GEARS TO WEAR OR RATTLE



TYPE T

Roof mounted searchlight for repair, inspection and emergency cars. Range of 360° at any height.

Inside one-hand lever control with light beam parallel to lever.

MANUFACTURERS OF WORLD'S MOST POWERFUL HAND SEARCHLIGHTS

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AN EDUCATIONAL OPPORTUNITY for public utility men. A fortnightly quiz of ten questions and answers on practical financial and operating questions discussed and decided by the State and Federal Commissions and Courts in their investigations of public utility companies.

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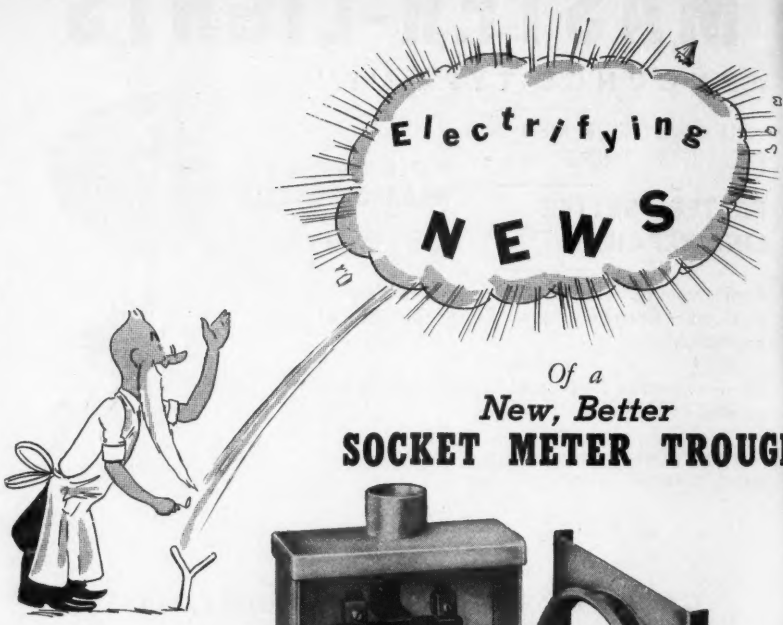
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Of a
New, Better
SOCKET METER TROUGH

WECO ATLANTA

- Extruded integral ring on cover for perfect water-proofing.
- Fabricated sheet steel or aluminum for indoor or outdoor weatherproof construction.
- Ample wiring space.
- Only one sealing screw per meter location necessary to hold cover in place.
- All terminals and current carrying parts fastened permanently in box.
- New type disconnect that is automatically locked in "on" or "off" position.
- New type terminal, with special clamping device that swings open for easy insertion of cable in gang installations.

Single phase or polyphase, for single and multiple, indoor and outdoor installations.

Write for New Socket Meter Trough Catalog No. 8

WALKER ELECTRICAL COMPANY

ATLANTA, GEORGIA



Barron G. Collier, Inc.

745 FIFTH AVENUE NEW YORK CITY

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. . . won and holds APPROVAL because its principle was correct

The typewriter's principle of impressing individual typ characters on paper as a substitute for handwriting i used today because it is fundamentally sound, practica gives the results desired. Millions of Neptune Meter Com pany's Trident Water Meters, utilizing the disc principle have been sold (and continue to be sold and to stay i service) because not only have they been approved i principle but, through Neptune precision methods of manu facture they have created new standards of sensitivity sustained accuracy, and low maintenance cost. Inter changeable parts protect against depreciation an obsolescence.

● *Neptune Meter Company, 50 West 50th Street (Rockefeller Center New York City. Branch Offices in Principal Cities. Neptune Meter Ltd., 345 Sorauren Avenue, Toronto, Canada.*

SINCE 1892

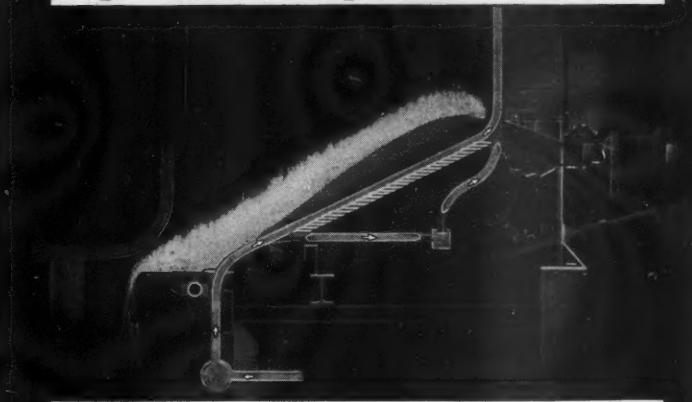
Trident WATER METERS

HAVE HELD THE CONTINUAL

APPROVAL OF THE WATER WORKS FIELD

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16.73¢ FOR FUEL
per thousand pounds of steam



Calculated efficiency—a basic consideration in the selection of steam generating equipment—cannot safely be arrived at only in terms of "thermal" efficiency developed by test. What the operator must have is a reliable expectation of *dollar* efficiency, based on actual performance of the equipment over an extended period. Ask an A-E-CO representative to show you data on the dollar efficiency of Taylor Stokers—efficiency such as shown by the installation at Sloane-Blabon Corporation, whose fuel cost ratio, including cost of storage and handling to stoker hoppers, is expressed above. American Engineering Company, Philadelphia, Pa.

GET THE FACTS ABOUT Reliability Capacity • Maintenance • Flexibility ★ Efficiency • Operation • Adaptability • Fuel Flexibility • Refuse Disposal Stack Discharge • Space Requirements • Obsolescence.

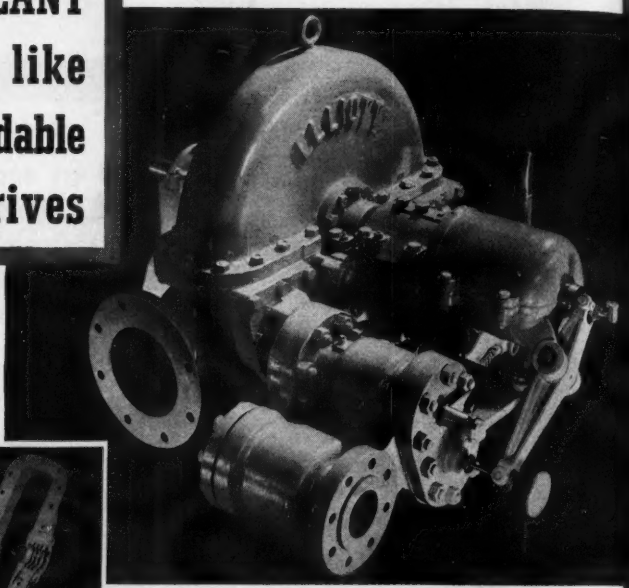
THE A-E-CO TAYLOR STOKER

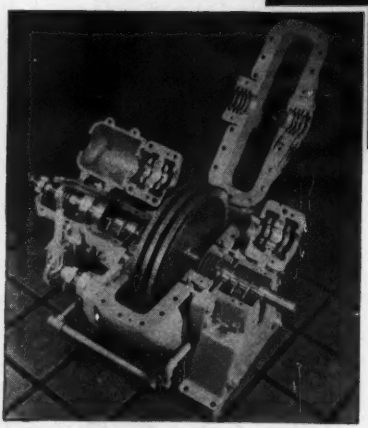
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UTILITY PLANT operators like these dependable turbine drives





ELLIOTT TURBINES

for mechanical drive just breathe sturdiness in every line. Note the husky construction; two oil rings on each bearing, large water-cooled oil reservoirs, removable basket steam strainer, rugged governor linkage, emergency overspeed governor. These turbines are built to "take it".

THE Elliott "Y" line of mechanical drive t bines is popular because it has the st Its design and construction features appe strongly to turbine operators and make sw performing machines.

One enthusiastic operator wrote, "You ha not scratched the surface in your praise these turbines. The Elliott turbines never gi us any trouble and perform their job w all-around satisfaction. Maintenance on the turbines has been less than on any other t bines in the plant".

You can get a Y-line turbine for practica any power requirement, steam pressure, temperature condition. Elliott geared units a available for low-speed drives.

Check construction details on these tur- bines. Write for Bulletins H-9 and H-11.

ELLIOTT COMPAN

Steam Turbine Dept., **JEANNETTE, P**

District Offices in Principal Cities

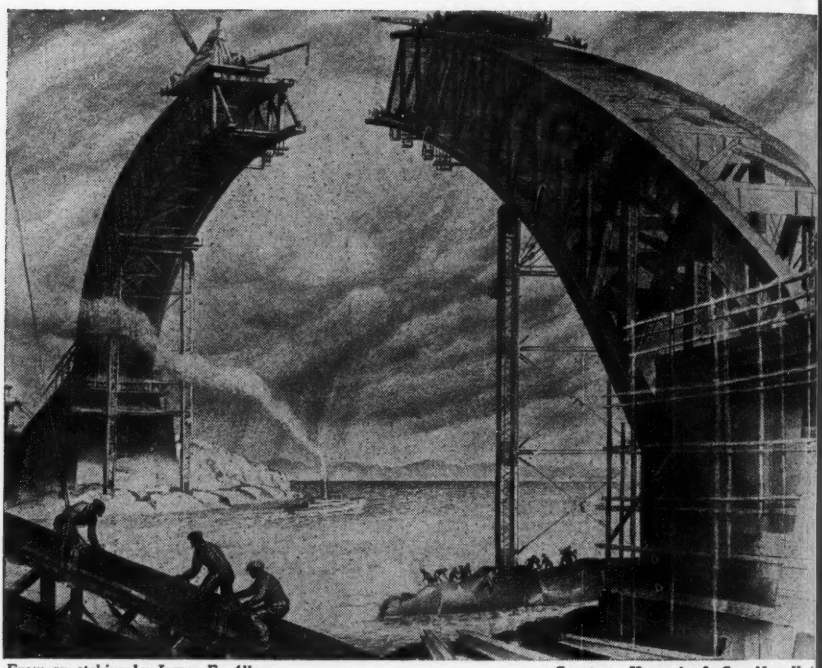
H-422c

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Utilities Almanack

JULY

6	Th	¶ *American Society of Heating and Ventilating Engineers ends convention, Mackinac Island, Mich., 1939.*
7	F	¶ *American Society of Civil Engineers will hold session, San Francisco, Calif., July 26–28, 1939.*
8	Sa	¶ *International High-Tension Conference concludes meeting, Paris, France, 1939.*
9	S	¶ *Michigan Independent Telephone Association will hold convention, Lansing, Mich., July 26, 27, 1939.*
10	M	¶ *American Bar Association opens 62nd annual convention, San Francisco, Calif., 1939.* ¶ *National Association of Broadcasters convenes, Atlantic City, N. J., 1939.*
11	Tu	¶ *"Telephone Day", 25th anniversary of first coast-to-coast telephone conversation, will be celebrated at New York and San Francisco expositions, July 29, 1939.*
12	W	¶ *American Transit Association will hold convention, San Francisco and Los Angeles, Calif., August 9–16, 1939.*
13	Th	¶ *Appalachian Gas Measurement Short Course will be held, University of West Virginia, Morgantown, W. Va., August 21–23, 1939.*
14	F	¶ *American Society of Mechanical Engineers concludes 5-day meeting, San Francisco, Calif., 1939.*
15	Sa	¶ *National Association of Railroad and Utilities Commissioners will convene, Seattle, Wash., August 23–25, 1939.*
16	S	¶ *American Water Works Association, Minnesota Section, will hold convention, Duluth, Minn., August 24, 25, 1939.*
17	M	¶ *National County Officers Association opens annual convention, Ogden, Utah, 1939.*
18	Tu	¶ *Pacific Coast Gas Association will hold meeting, San Francisco, Calif., September 5–7, 1939.*
19	W	¶ *Governmental Research Association will hold session, Chicago, Ill., September 6–9, 1939.*



From an etching by James E. Allen *Courtesy, Kennedy & Co., New Yor*

Arch of Steel

Public Utilities
FORTNIGHTLY

VOL. XXIV; No. 1 JULY 6, 1939

Federal Competition May Be Unconstitutional - but?

Article I

The fact that the government may not lawfully engage in private enterprises means nothing to the owners of business injured thereby, if they have no standing in the courts to question it—Significance of the recent Supreme Court TVA decision—its historical and philosophical background.

BY WILLIAM M. WHERRY
OF THE NEW YORK BAR

THE TVA Case is not one of the great trail-blazing cases where the court lays down principles which will serve for the development of law for a long time to come.[1] It is an important decision, somewhat anachronistic, and based on a technical ground. To understand the full significance of the case requires a brief review of the historical and philosophical background.

In a tyrannical government the state always insists that it is above the law. "The King can do no wrong." The state cannot be sued. The validity of its actions cannot be challenged, for they rest upon force and coercion and not upon reason and consent.

On the other hand, in a liberal society, the sanction of the law rests as far as possible upon an appeal to justice and reason and good faith. Be-

[1] Editor's Note—In the TVA Case (U.S. Sup. Ct. 1939) 27 P.U.R.(N.S.) 1, the Supreme Court held in substance that public utility companies without exclusive charters or franchises have no legal right to question the authority of a Federal agency to engage in business with them to their injury.

ginning in 1605, with Coke's resounding reply to King James, in which he asserted that even the King was subordinate to the law, the development of the law has been along liberal lines. The actions of the state have been subject to challenge by its citizens for over three hundred years, in England and in this country. First and foremost, they may be challenged in elections and by ballot of voters, but parallel with this has grown a practice, both in England and in this country, of subjecting such action to scrutiny by courts of law and similar tribunals.

A truly liberal government should welcome such challenge and the opportunity to justify the reasonableness and good faith of its acts, not merely at the polls, but also before an independent tribunal. This country, of course, was founded on that theory, and the right of the individual and of minorities to challenge the action of the government was safeguarded in our Constitution in every way. Of course, a minority may seize control of the government, establish a tyranny, and oppress a majority, but our Constitution is preoccupied with safeguarding the rights of the individual and of the minority against such oppression.

Having provided for elections, it was assumed that the majority could take care of themselves. Freedom of the press, freedom of speech, freedom of the pulpit, would insure full and free discussion, and in that way guarantee that the principles applicable to and the effect of any proposed action would be thoroughly understood and acted upon by the electorate. Furthermore, an independent Federal judiciary was established with coördinate powers to examine into any case where a direct injury was suffered or threatened by action of the government so as to determine whether such action was within the powers conferred by the Constitution.

EARLY in our history, the question of immunity of the state from suit by another state or an individual arose, and the Eleventh Amendment was actually added to the Constitution in order to confer such immunity from suit upon the states.

The first government to be founded on the theory of consent of the governed and upon the most liberal principles of freedom found it necessary to embody in its fundamental law the recognition of the principle borrowed from the armament of tyranny, that the state was immune from suit except on its own consent. From time to time, whenever there has been a clash between different departments of government or between the Federal government and the states, or between the state government and the courts, resort has been had to this principle in some form or other to evade the necessity of examining some action of the executive or legislative branches of state or Federal government on its merits.

The TVA Case is the latest example of this.

At the same time, the TVA Case narrows and limits rights of property and freedom to do business.

A right which is not protected by the courts is, of course, no right, and this decision refuses to recognize the right of the plaintiffs to protect their business by resort to the courts from assault by the government.

It is obvious that one department of a government cannot usurp the functions of another. The executive cannot make the laws or dictate to the legislature what laws shall be made. On the other hand, the executive could not function if the legislature or the courts interfered with its normal operations. Similarly, no sovereign state can be coerced by the authority of another government and still remain sovereign. Recognizing these principles, we would nevertheless feel more sympathetic with those who forced the enactment of the Eleventh Amendment to the Constitution if their action had been prompted in a more worthy cause. As a matter of fact, in 1791, the states of the Union were in bad financial condition, and could not contemplate with equanimity the restoration of property confiscated by them from Tories, refugees, and others. In addition, they were trying to squirm out of meeting their own obligations. So when Dutch creditors and other foreigners attempted to sue the sovereign states of Maryland, New York, and Virginia, in the courts of the United States, to collect debts due and owing by those states, there was a great outcry, and the newspapers were full of protests and high-sounding arguments reiterating that the sovereignty of the states could never be sacrificed by consenting to suits in the courts to test the justice of their dealings with private property and their action toward their debts.

This culminated in the case of Chisholm *v.* Georgia, wherein the state of Georgia refused to appear in the Supreme Court at the suit of a British creditor, on the ground that it was a sovereign state and could not be sued without its consent. The court, nevertheless, sustained its jurisdiction.[2] The popular outburst resulted in the Eleventh Amendment to the Constitution, which was ratified in 1798 and prohibited suits against the states.

It will be noted that in this instance there was no attempt on the part of the Federal government to coerce the states, nor was there any interference by one department of the government with another. It was simply the old case presented so many times in the history of monarchs, where the government took refuge in immunity from suit in order to prevent being called to reckoning for acts which on the part of individuals would have been plain robbery or repudiation of honest debts —the very sort of acts which gave the word "bankrupt" such a sinister meaning.

There were many statements in the early cases by which the court recognized that agents of a government who acted outside of their authority or under illegal statutes could be called to account in the court as private individuals, and that such suits against agents would not be suits against the state itself.

[2] (1793) 2 Dall. 419, 1 L. ed. 440.

¶ "The *TVA Case is not one of the great trail-blazing cases where the court lays down principles which will serve for the development of law for a long time to come. It is an important decision, somewhat anachronistic, and based on a technical ground.*"

IN 1819 the case of McCulloch *v.* Maryland was decided.[3] This case arose over the attempt of the states to tax the Bank of the United States out of existence. Out of that case came Osborn *v.* Bank of United States, wherein a judgment was sustained against a state officer who stole money under the pretext that he was complying with an illegal tax statute of Ohio, in defiance of an injunction of the United States Supreme Court. The court there held that this was not a suit against the state of Ohio.[4]

In 1876, in the financial stress of the great depression of 1873, cities and states attempted to escape liability for their obligations, and the scandals arising out of repudiation of such debts brought a great deal of litigation into the courts, which was hotly resented by the state and municipal governments involved, but which further established the principle that a government official cannot escape the consequence of his act by relying on an illegal or void statute or ordinance.

IT was not, however, until 1891 that cases against state officers multiplied in the United States Supreme Court, and the principle was frequently applied. By that time the liberal principle that a state could not avoid justifying its acts in the courts, by claiming absolute immunity from suit, had become definitely a part of our fundamental law. This doctrine was resented by the states, and that resentment culminated in 1908, when the Supreme Court handed down the famous decision in Ex parte Young,[5] and resulted in 1910 in the statute requiring a 3-judge court to sit in every case involving an injunction against a state officer, where his act was challenged, because the statute under which he acted was claimed to be unconstitutional.

THE power of the courts to determine legal controversies involving the question of constitutionality of statutes was clearly recognized by that act, and the fact that this power was essential to the preservation of liberty was recognized therein.

During all our history, there have been cases where the Supreme Court has sought to avoid clashes between states and the United States, or between states, or between the judiciary and other government departments. For instance, in 1819, in Miller *v.* Nicholls,[6] there was a conflict between the United States and Pennsylvania over a fund claimed by both governments, and the court dismissed the case because of a technicality in pleading and did not pass on the merits. Of course, the outstanding illustrations are found in the Civil Rights cases. Such decisions have not always been based on mere technicalities. For instance, in Mississippi *v.* Johnson, the court declined to enjoin the President in the performance of his official duties.[7] In the reconstruction cases (Georgia *v.* Stanton),[8] the court declined jurisdiction because the rights involved were political. Nevertheless, when a case was presented to the court, where there was clearly involved a legal right of a justiciable character, the court did not decline to take jurisdiction, but passed upon actions of the legislature or the

[3] 4 Wheat. 316, 4 L. ed. 579.
[4] (1824) 9 Wheat. 738, 6 L. ed. 204.
[5] 209 U.S. 123, 52 L. ed. 714.
[6] 4 Wheat. 311, 4 L. ed. 578.
[7] (1867) 4 Wall. 475, 18 L. ed. 437.
[8] (1867) 6 Wall. 50, 18 L. ed. 721.



Rights of Individuals and Minorities

"... the right of the individual and of minorities to challenge the action of the government was safeguarded in our Constitution in every way. Of course, a minority may seize control of the government, establish a tyranny, and oppress a majority, but our Constitution is preoccupied with safeguarding the rights of the individual and of the minority against oppression. Having provided for elections, it was assumed that the majority could take care of themselves."

executive, regardless of whether such decision might interfere with coördinate departments. This was true in cases involving state statutes, as well as Federal statutes, cases arising under the Fourteenth as well as cases under the Fifth Amendments, or § 10 of the Constitution itself. Among these cases was Texas *v.* White,[9] fixing the status of seceding states in a powerful opinion dealing with the same dynamite that the court avoided handling in Georgia *v.* Stanton.

ONE of the most notable cases was United States *v.* Lee.[10] That case shed luster, not merely on the tribunal which rendered the decision, but on the United States as a whole, and is generally regarded as one of the glories of out constitutional law. It stands as one of the finest examples of justice and equity in the history of jurisprudence.

The Supreme Court sustained an action of ejectment against the officers and agents of the United States who were holding for public use possession of property claimed by the son of General Robert E. Lee as an heir of his mother. The defense was that the land had been bought at a tax sale by the United States government. The plaintiff claimed the tax sale to be illegal. The government claimed that it could not be sued. The Supreme Court held that the doctrine that the United States cannot be sued without its consent has no application to officers and agents of the United States, but that the lawfulness of the possession and the right or title of the United States to the property could be challenged in a suit of ejectment.

MR. Justice Miller examined the principle that a sovereign cannot be sued without its consent, and quoted with approval the opinion of Mr. Justice Gray, of the Supreme Court of Massachusetts, in which he said:

> The broader reason is, that it would be

[9] (1869) 7 Wall. 700, 19 L. ed. 227.
[10] (1882) 106 U.S. 196, 27 L. ed. 171.

inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury. Briggs *v.* Lightboats (1865) 11 Allen (93 Mass.) 157.

Mr. Justice Miller says:

As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts.

And he further said that the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has been repeatedly asserted, but that "the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."

Further he stated that there was abundant evidence in the decisions of this court that the doctrine, "if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit."

CLOSELY after this statement came the following exposition of the fundamental principle:

Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.

The principle applicable to this whole subject was never better expounded than by Justice Sutherland, in the famous case of Massachusetts *v.* Mellon.[11] At page 488 Justice Sutherland said:

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. Gaines *v.* Thompson (1869) 7 Wall. 347, 19 L. ed. 62. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be, not to decide a judicial contro-

[11] (1923) 262 U.S. 447, 67 L. ed. 1078.

versy, but to assume a position of authority over the governmental acts of another and coequal department—an authority which plainly we do not possess.

No one could quarrel with the statement of principles made by Justice Sutherland in that case. Nevertheless, there has been criticism as to whether those principles were correctly applied, even in that case. The significant language from the point of view of liberal philosophy is as follows, and I repeat it because of its importance to the case which we are now considering:

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may only be considered when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.

Although the decision in Massachusetts *v.* Mellon was a unanimous decision, there still is room for argument that in that very case there was presented to the court a direct injury threatened to the state of Massachusetts, and the taxpayer, Frothingham, which did present a justiciable issue and which rested upon an act of the legislature, which, if unconstitutional, would have made the injury unlawful. In that case there were two complaints, one by the state of Massachusetts and one by a Federal taxpayer, which challenged the constitutionality of the Sheppard Towner Maternity Act. That statute appropriated Federal funds, to be apportioned among the several states which accepted the act for the purpose of regulation of maternity problems and child welfare cases.

Massachusetts had not accepted the statute and claimed that the act was beyond any of the powers of the Federal government, and was, therefore, unconstitutional, and sought to enjoin the Secretary of the Treasury from paying out these funds for that purpose. It claimed that the citizens of Massachusetts, New York, and Pennsylvania, being the richest states, would contribute most largely to this fund, and even if those states accepted the benefits of the act they would receive only a small part of the benefits of the funds collected. For instance, Massachusetts would contribute 5 per cent of the total fund, but could not, under any circumstances, receive more than 3 per cent of the benefit.

It further claimed that if the act was sustained it would tend either to coerce Massachusetts to surrender the police regulation of its internal affairs guaranteed to it under the Constitution in order to procure the benefit of this act, or to consent to the use of its own taxpayers' money for the benefit of some other state.

The court held that this was not a direct injury to Massachusetts and did not present a justiciable issue. Massa-

¶ "The *first government to be founded on the theory of consent of the governed and upon the most liberal principles of freedom found it necessary to embody in its fundamental law the recognition of the principle borrowed from the armament of tyranny, that the state was immune from suit except on its own consent.*"

chusetts cannot "as *parens patriæ* . . . institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof," nor "to enforce their rights in respect to their relations with the Federal government."

THE taxpayer presented more difficulty to the court because she was actually contributing taxes, but the courts held that her interest in the fund was slight, by reason of the fact that her contribution was only a general one, and to all the governmental expenses and not to this particular fund. It distinguished the case from the case of a municipal taxpayer seeking to enjoin a municipal officer from illegal appropriation of tax funds. The court said that the taxpayer point had never been decided directly by the courts of the United States. In this particular case the taxpayer's interest in the fund was too remote—it was "shared with millions, is comparatively minute and indeterminable, and the effect upon future taxation of any payment out of the funds so remote, fluctuating, and uncertain that no basis is offered for appeal to the preventive powers of a court of chancery."

The court held that neither the state of Massachusetts nor the taxpayer had any standing in a court of law to enjoin what they claimed to be illegal use of public funds by the Secretary of the Treasury. The remedy was not in the courts, but was by ballot.

Assuming that there was no justiciable interest or direct injury, the court was clearly correct in its statement of the principle that to interfere with the use of the fund would be not to decide a judicial controversy but to assume a position of charge over the governmental acts of another and coequal department of the government, and the court was correct in recognizing that that was "an authority which it did not possess."

THIS principle has been applied in a number of important cases in the Supreme Court. Perhaps the most outstanding is the Panama Canal Case, of Wilson *v.* Shaw.[12] This was a suit to restrain the Secretary of the Treasury from paying $40,000,000 to the Panama Canal Company and $10,000,000 to Panama, and to restrain the building of the canal. The court held that the plaintiff did not show sufficient pecuniary interest, and the suit did not present a justiciable issue. Judge Brewer said the case might have been disposed of on a technicality, but instead considered it and decided it upon the merits.

This case [13] illustrates what I submit

[12] (1907) 204 U.S. 24, 51 L. ed. 351.

[13] Since the above paper was prepared, there has been published an illuminating opinion of Mr. Justice Frankfurter in Keifer & Keifer *v.* Reconstruction Finance Corp. (1939) 59 S. Ct. 516, 517. In that opinion Justice Frankfurter expresses the liberal view as follows:

"The starting point of inquiry is the immunity from unconsented suit of the government itself. As to the states, legal irresponsibility was written into the Eleventh Amendment; as to the United States, it is derived by implication. Monaco *v.* Mississippi (1934) 292 U.S. 313, 321, 78 L. ed. 1282. For present purposes it is academic to consider whether this exceptional freedom from legal responsibility rests on the theory that the United States is deemed the institutional descendant of the Crown, enjoying its immunity but not its historic prerogatives, cf. Langford *v.* United States (1880) 101 U.S. 341, 343, 25 L. ed. 1010, or on a metaphysical doctrine 'that there can be no legal right as against the authority that makes the law on which the right depends.' Kawananakoa *v.* Polyblank (1907) 205 U.S. 349, 353, 51 L. ed. 834. *But because the doctrine gives the government a privileged position, it has been appropriately confined.*" (Italics supplied.)



Independence of Government Departments

"IT is obvious that one department of a government cannot usurp the functions of another. The executive cannot make the laws or dictate to the legislature what laws shall be made. On the other hand, the executive could not function if the legislature or the courts interfered with its normal operations. Similarly, no sovereign state can be coerced by the authority of another government and still remain sovereign."

should be the proper attitude of a liberal government in every case where the legality of its acts is doubtful. Why should the government seek to raise technical objections and prevent the examination of the legality of its acts when it claims to rely for its existence not on force but on reason, justice, and fair dealing? Why should courts in countries where freedom is cherished sustain technical objections and be astute in finding reasons to avoid passing on the legality, justice, and fair dealing of acts of government officials?

IF the government were sincerely anxious to act within its constitutional powers and scrupulously to observe all limitations thereon, it would be feasible for Congress to amend the Judiciary Act so as in effect to consent to the jurisdiction of the Supreme Court in every case involving the question of alleged encroachments on constitutional powers. Undoubtedly the executive and legislative branches have duties, coördinate with those of the courts, to construe and interpret the Constitution and jealously to safeguard the rights created thereby. Administrative tribunals have been established to which have been delegated many executive and legislative functions. The legislative could delegate to the Supreme Court the duty of advising with respect to constitutional limitations.

Important as checks and balances are in our form of government, such cases as Massachusetts *v.* Mellon, and the other cases above referred to, show that the Supreme Court can be trusted to perform such a duty with scrupulous regard to its judicial function and to avoid trespassing on the provinces of the executive and legislative branches of the government. Because of the character of the problems presented and studied by it, and the train-

ing thus obtained, the meanest member of that court acquires and cultivates a judicial attitude towards such problems.

The next and final article on the TVA decision will appear in the next issue of PUBLIC UTILITIES FORTNIGHTLY.



April Fool's Day and the Utilities

THE Chesapeake and Potomac Telephone Company, serving the nation's capital, on April 1, 1939, made effective plans for April Fool's Day shenanigans. The company put special operators to work on phone connections for the Washington zoo, cemeteries, insane asylums, Commerce Department aquarium, and other targets for practical jokes on April 1st. So when the "fall guy" fell for the note telling him to "call Mr. Lyon" or "Mr. Bear," at Columbia 9743, "urgent," a honey-voiced operator asked: "Are you calling the zoo?" Just to make sure, the zoo's switchboard staff was also on its toes. An enterprising newspaper reporter succeeded in getting through a call on April 1st and asked for the noted Mr. Lyon. "Did you say Mr. or Mrs. Lyon?" asked the zoo. When the male was preferred, the voice said, "Sorry, he can't come to the phone now;—he's taking a bath."

* * * *

IN Germany on April 1, 1938, a pair of enterprising radio announcers decided to kid their audiences in the proper spirit of the day. The Reich listeners were informed that a new invention was going to be demonstrated which would send not only sound but smell over the radio. "Now," said the radio announcer, "put your nose near the loudspeaker and see if you catch the scent of this lilac perfume." (Business of spraying perfume . . . pause.) "Next, try to catch the aroma of this delicious fried weinerwurst." (Business of making property noise like weinerwurst sputtering in the frying pan.) So it went with the other sound effects. Imagine the announcers' surprise, however, when the next day several letters came through the mail from listeners expressing wonder and admiration at the new device and marveling that the scents came through the radios perfectly.

* * * *

A WELL-KNOWN superintendent of a large municipal lighting plant in the Middle West tells this one on himself, but adds that he is "still too mortified" to allow his name in print. At 8 A. M. on April 1, 1939, just as he went on duty, a phone call came in that the street lights on the west side of town were still on. Since the street switch at the substation had been cut off, the "soop" dispatched a "shooter" to the west side to check up on possible local trouble. A few minutes later, the lineman reported everything okeh on the west side, and then the boss realized it was April Fool's Day. So when he received more phone calls that morning about lights being left on, he had a witty answer for them. However, it struck him as odd that so many folks bothered him with this silly idea of a joke. Imagine his chagrin when he went out to lunch to see with his own eyes all the street lights in the downtown area burning brightly. What happened was that in the examination of the switches that morning after the original call, somebody, somehow, had closed the downtown lighting circuits.



The Forgotten Public

A suggestion for the settlement of disputes between labor and the utilities

By WILLIAM STARR MYERS

When the employer is a utility in a labor dispute, there are three parties, not two, that are involved; and the third party is the public.

This public interest is quite aside from the well-known fact that the securities of utilities are widely held by banks, insurance companies, and other institutions whose solvency is so vital to the country's welfare. Nor is the public interest one which arises from the fact that the securities of these utilities likewise are held by a large portion of the public without whose spending and commercial activities the demand for labor would be materially decreased.

The public has a still more direct and paramount interest in labor disputes. On the one hand, if a strike occurs, very great public inconvenience and loss will result from a stoppage of a public utility operation. On the other hand, if the utility, either voluntarily or through its anxiety to maintain amicable relations with its employees and preserve the continuity of its service, agrees to wages beyond its ability to pay,[1] then it must face one of two alternatives. Either the increased wages must be passed on to its customers by increasing the rates which the public must pay for the services rendered, or the utility will be unable to give adequate service to the public, a condition which even insolvency may not be able to remedy. This is because it must depend upon the maintenance of an income which will be sufficient to allow constant expert inspection and prompt repair and for the replacement of facilities used in its operation.

As a result of the laws now in force almost everywhere throughout the country, the situation of a utility when negotiating with its employees for wages and wage expenses amounts to something like the following:

Its income, namely, the rates it may charge, is limited by legislation, either

[1] Most utilities are now financially so reduced that they are unable to absorb increased wages or other increased costs.

directly or through regulatory commissions. Without the sanction of one or the other authorities, sometimes both of them, its income cannot be increased.

There are times when, as a result of the "law of diminishing returns," increased rates result in decreased consumption or use of the utility and, therefore, decreased receipts.

RECENT legislation, designed to place in the hands of labor leaders every advantage possible and which at the same time deprives employers of reciprocal rights or rights of any kind, makes it impossible for the employer to bargain on even terms with the representatives of its employees. For example, it would be an unfair labor practice and subject the employer to severe penalties for an employer to deal directly or indirectly with its employees once they have chosen a union as their representative, regardless of the fact that the officers of the union are not employees and have not the background which comes from years of previous dealing between the employer and its employees. In other words, the employer is not now in a position to acquaint its or his employees with the real facts in any given situation.

Skilled operators are necessary for the operation of a public utility and a period of training is required for those who perform the more important functions. The safety of the public depends upon such skill and training. The labor leaders know this and generally threaten an immediate strike if their demands are not met, the result of which is that the utility will not have time to obtain skilled employees to operate the utility.

FURTHERMORE, in case of a strike, not all the new employees necessary for carrying on the operation of the utility can be obtained locally and so the employer is faced with still another dilemma. If a strike is actually in progress and the employer brings in workers from another state to operate in the place of those who have refused to work, he may run the risk of being charged with violation of an Act of Congress,[2] which makes it a crime to transport in interstate commerce any person for the purpose of obstructing or interfering with peaceful picketing or the right of self-organization or collective bargaining.

Also, if anyone works for an employer whose employees are on strike, that person may be denied the right to join any union which, in those cases where the unions are able to obtain closed-shop agreements, means he is actually deprived of the right to work at all.

The taxes of utilities are constantly being increased by legislation in which there is no relation between the object of the tax and the person taxed. One example of this is the gross income tax levied for unemployment relief on utilities which cause practically no unemployment. In New York city this tax alone is 3 per cent of gross receipts, which is approximately 3,000 times more than the tax for the same purpose levied on other businesses. All the utilities in the transportation business are required to pay a relatively larger share of their gross earnings toward the social security programs of the state and Federal governments. This is due to the relatively very large factor of labor in their operation as

[2] June 24, 1936, § 746, 49 Stat. 1899, as amended June 29, 1938, § 813, 52 Stat. 1242.



Utility's Plight in Rival Union Fights

"IF, as is sometimes the case, the utility is the field of a contest between leaders of rival unions who are striving to be the representatives of the employees for the purposes of collective bargaining, the utility is indeed in an anomalous position. It can take no part whatsoever in the struggle and has no right of appeal to any body or commission for a judgment or determination until there is a strike or threat of a strike. It then can act only through mediation or conciliation bodies which have no power of enforcing their determinations."

compared with other corporations similarly taxed and notwithstanding that there usually is no seasonal unemployment in the operation of a public utility.

IF, as is sometimes the case, the utility is the field of a contest between leaders of rival unions who are striving to be the representatives of the employees for the purposes of collective bargaining, the utility is indeed in an anomalous position. It can take no part whatsoever in the struggle and has no right of appeal to any body or commission for a judgment or determination until there is a strike or threat of a strike. It then can act only through mediation or conciliation bodies which have no power of enforcing their determinations.

Thus the employer is between the upper and nether millstones. On the one side, if the labor demands (and they seem constantly to increase) are not met, he is threatened with death through starvation from lack of a sufficient income. On the other side, if the demands of labor are resisted, he faces death through ruination of a business which, in the case of a utility, depends upon continuity.

Arbitration furnishes no way out to the utility employer because the arbitrators who are given the power to increase the expenses have no power to increase the receipts. These latter are the only source of income for paying the increased expenses.

THERE is one principle, however, on which, in theory at least, all parties concerned are in complete accord, and that is that the capital represented by

the property of a public utility used in service to the public is entitled to a fair return. Also, the leaders of the two rival organizations, the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO), are committed to the same proposition. And the public, as represented by its elected legislative bodies, predicates regulation and control of utilities on the basis that the invested capital, to the extent of the value of the property devoted to public use, shall earn a fair return and no more. The courts prevent the enforcement of rates yielding less than a fair return on the value of the property devoted to public use on the ground that to do otherwise would be confiscation. The remaining party involved, namely, the utility which in the final analysis consists of those who hold its securities, is, of course, in accord with this principle of a fair return because that is the very reason for the existence of any utility itself.

This principle then, on which there is such unanimity of accord, should furnish a basis for the determination of disputes between public utilities and their employees. It does more than that. It requires that two of the three parties concerned shall not act independently of each other when the interests of all three are so vitally interrelated.

These parties are:

1. The public as represented by government agencies (Federal or state) and
2. The labor organization.

THIS discussion, if stated correctly, actually sums up as follows: The method by which disputes between labor and the utility may rationally be provided for by the enactment by Congress, with respect to utilities engaged in interstate commerce, and by any state legislature, with respect to those utilities not engaged in interstate commerce, of a statute.

This statute might require that in the case of a dispute between labor and a public utility either the labor organization or the utility may, within a required time, present the controversy to the public utility commission having jurisdiction over the utility; that thereupon the commission must determine whether or not the granting of the demands of the labor organization would deprive the utility of a fair return on the value of its property devoted to the public use, on the basis of the rates then in force or as permitted to be increased by the commission in such a determination. The commission also should be empowered by this proposed statute to authorize such an increase.

The statute should require that there shall be no strike within thirty days after the utility commission has made the above determination; that if such a determination is that by the granting of the demands of the labor organization the utility would be deprived of a fair return, either on the basis of the then-existing rates or of the increased rates thereby authorized, then if there is a strike, that the utility shall no longer be required to recognize that labor organization; nor, in its dealings with that organization, be bound by any of the laws protecting that labor organization.

BY such a law the employees would not be deprived of the right to strike but would be penalized if they did strike contrary to the findings of

the regulatory commission. As a result, few labor organizations, and especially their leaders, would risk such possibilities by ordering a strike. Also the public would be protected from the unreasonable demands of employees either by not being required to suffer the inconvenience and loss due to strikes or by being required to pay increased rates unless these are judicially found to be necessary and proper. Furthermore, the utility would be able to bargain on more even terms with the labor organization and at the same time it would not be compelled to submit to unreasonable demands through fear of the results of a strike.

It will be noted that the statute here proposed follows, in some respects, up to the point of a report by the Emergency Board appointed by the President, the procedure outlined in the Act of Congress known as the Railway Labor Act,[3] with reference to strikes on steam railroads and carriers engaged in interstate commerce. The provision would be new which would give to the findings of the utility commission some effect beyond that attaching to the findings of an emergency board.

[3] May 20th, C. 347, 44 Stat. 577.

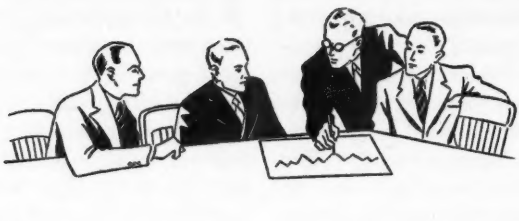
THE objection may be interposed by the leaders of labor organizations that the above procedure would entail great delay in final adjudication and, therefore, also delay the payment to employees of any increases to which they are entitled. The answer to this is that the statute here proposed might provide that pending the above-mentioned determination by the utility company the utility be required to deposit such amount as the commission might at the outset of the proceeding find necessary to cover any wage increase which might finally be granted.

Thus the only advantage of which the employees and the leaders of the labor organizations would be deprived is the ability to cripple the utility by a sudden strike and prevent the utility from finding new skilled employees to continue its operation. The prevention of this, of course, is the purpose of the procedure suggested. And it goes without saying that such a procedure as is here outlined can be adopted by any one or more of the several states as well as by the United States Congress. Also the failure of any one legislative body to adopt it would not prevent its being adopted and put into effect *by others.*

Progress under the American System

"MORE material progress has been made during the last 150 years under the American system of business enterprise than during all the preceding centuries in world history. This record of achievement is a challenge to those who would radically change that system. . . . Under this system, the United States, with a population of less than 7 per cent of the world's total, controls about 40 per cent of the wealth of the world. One hundred years ago the average person had about 52 wants, of which 16 were regarded as necessities. Today the wants number 484 on the average, of which 94 are looked upon as necessities."

—KARL COMPTON, *President,*
Massachusetts Institute of Technology.



No Hard and Fast Rules for Depreciation Reserve

Any attempt at standardization would, in the opinion of the author, be detrimental and might result in a serious situation not only from a financial standpoint but also from that of service and rates.

By EDWY L. TAYLOR
FORMER CHAIRMAN, CONNECTICUT PUBLIC UTILITIES COMMISSION

REGULATION is not an exact science. It should not be absolutely fixed in any of its fields. On the contrary, regulation must be sufficiently flexible to meet the varying conditions affecting each separate utility and so permit the particular company to maintain a sound financial condition in order to render safe, adequate, dependable, and continuous service at reasonable rates. Any other course of regulation may be detrimental to these purposes and against the public interest.

This general statement is not intended to suggest that the policies of a regulatory commission shall be subject to continual change. The adoption of general policies for regulation is essential, but each commission must use due discretion in establishing flexible methods of applying its firm general policies.

Regulatory methods should encourage sound financial policy in utilities to the end that proper service may be rendered to utility customers and at reasonable rates, since sound financial policy will result in lower money costs which in turn should have their bearing upon service and rates.

It is always difficult and in most instances impossible for a regulatory commission to exercise immediate and continuous control over the operating revenues of a utility, but the establishment of a depreciation reserve, its amount, accruals thereto, and its use for property retirement are quite within regulatory jurisdiction.

This depreciation reserve is an asset even though it is carried as a liability on the balance sheet, and it may not be reduced for any purpose other than property retirement. It may be distributed to stockholders only upon dis-

continuance of the entire plant and liquidation of the company.

This reserve for depreciation is in most respects quite different from that required in banking, business, industrial, commercial, and mining enterprises. Each of these requires a special reserve of some kind to meet contingent extinguishment of capital. If such special reserves increase to such extent as to be greater than required for the needs of the business, the funds may be transferred to surplus and distributed to stockholders. In such enterprises the reserve is not essentially and solely for replacement of facilities as in the case of a public utility, and so the common conception of such a reserve does not apply in the public utility field, where it is provided for the benefit of a utility's customers, who should at all times be protected by it.

THE determination of a fair and reasonable amount for the annual accrual to the depreciation reserve and the fair and reasonable amount for the reserve cannot be accomplished by any absolute or fixed method, and in acting on a fair and reasonable basis the commission must consider all of the variable elements affecting its determination.

This reserve is one of the most important accounts to be considered in determining the utility's financial condition from a review of the balance sheet, especially in connection with the issuance of securities, their sale price and interest rate necessary to obtain capital funds.

The term depreciation reserve for this account is misleading. It would more properly be termed the replacement reserve, as it is the fund required to offset the extinguishment of the investment in depreciable property which must be replaced for continuance of service. This reserve is usually built up by annual accruals of money taken from the current operating revenues; but should these prove inadequate, a transfer of funds from surplus may be required from time to time, and if this is not practicable, then it may be necessary to use the abandoned property account as authorized to gradually extinguish by amortization extraordinary property retirements, already incurred or in prospect, without unduly disturbing the utility's financial condition.

THE annual accrual to the reserve should be in sufficient amount, but without placing an undue burden upon ratepayers. Determination of this amount demands consideration of all the charges against the reserve.

It involves altogether different consideration and may thus vary widely from the amount of depreciation determined as accrued in connection with property assessments, income tax returns, or for insurance purposes.

The depreciation reserve is sometimes considered to represent the actual depreciation in the physical property; but this conception is erroneous since the actual depreciation in the plant at any time or over any interval of time is not of material importance and generally is not of substantial degree for reasons which will be stated later.

The depreciation reserve is not a fund from which to reimburse the owners of the utility for possible future losses in the plant. It is, instead, a reserve maintained solely for the purpose of replacing for continuance of

utility service units of the plant which from time to time go out of service on account of any of several causes discussed hereinafter.

Though the annual accrual for depreciation reserve is an element of operating expenses which is deducted from operating revenues in connection with determining operating income and thus is one factor in determining the amount of return and rates, it is not large in comparison with other items of operating expenses.

In relation to operating revenue or to fixed capital investment in the plant the amount may necessarily vary in the same utility in different years, from a small to a substantial sum, depending not only upon the variable considerations but also upon the ability of management to set aside the funds.

As plant units are retired from service their cost less net salvage, if any, is charged against the depreciation reserve at the time when their cost is credited to the fixed capital account, but some utilities leave the fixed capital account unchanged and charge the cost of replacements to maintenance, especially for items of small amount.

Though the latter method accomplishes a reasonably satisfactory purpose, the former practice should be followed since it is in accord with the best accounting procedure and insures that the fixed capital account fairly represents the original cost of the plant.

The retirement of units of plant occurs by reason of several different causes, some quite definitely predictable, but in most cases the particular cause, as well as the time of its concurrence is unpredictable. Determination of the amount of accrual demands consideration of all such factors which include the following:

1. Deterioration or actual depreciation and loss of service life.
2. Inadequacy.
3. Change in the art and obsolescence.
4. Loss or damage by accident.
5. Loss or damage by act of God.
6. Replacement required beyond managerial control.

Depletion occurs in natural gas resources and in leases or franchises bearing a time limit, but it will not be dealt with in this discussion since it does not affect all utilities.

THERE is a feature of risk of discontinuance of a part or all of a utility's service. Upon the basis of past experience in all forms of public utility service it is an almost certain prediction that if such risk is not provided for by management the investors will suffer loss and possibly complete extinguishment of their capital. This is a risk similar to that attendant upon any commercial enterprise. Such losses are substantial factors responsible for business depressions. This feature of discontinuance is altogether distinct from the factors of change of

¶ *". . . depreciation reserve is an asset even though it is carried as a liability on the balance sheet, and it may not be reduced for any purpose other than property retirement. It may be distributed to stockholders only upon discontinuance of the entire plant and liquidation of the company."*

the art and obsolescence, and is not a factor in determining the amount of annual accrual for depreciation reserve. This situation would be confronted if a water utility fairly constructed to meet the needs of a community should find itself with reduced revenues because of discontinuance or material reduction in the use of the utility's service by one or more of its large consumers—the plant thus becoming overbuilt for the needs of the community it serves. Such reduction of use of a utility's service may be brought about by quite indirect causes through which the service is supplanted by other competitive public utility service of a different type, or by an equivalent private service, or again by changes in the processes, needs, or location of the utility's consumers.

This is usually an altogether unpredictable commercial risk. It is one to be assumed by the investors and not specifically provided for directly or indirectly in operating expenses. Sound management will provide against it in such manner as may in the opinion of management be necessary and sufficient by accruals to surplus, amortization of bonded indebtedness, or otherwise, in order to enhance the stockholders' equity in the property.

LET us consider the various factors mentioned which may be involved in the determination of the depreciative accrual:

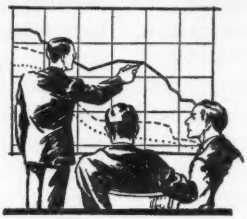
1. Deterioration or actual depreciation of the physical property.

If a property is adequately maintained, actual depreciation which can be observed or determined in any other manner is reduced to a minimum.

This actual physical depreciation and the so-called wear and tear in the plant is, to only a limited extent, determinable by observation or experience or by both. Such deterioration does not affect the serviceability of the plant or its units to any appreciable degree, is negligible if the plant is adequately maintained, and practically does not affect the ability of any unit to render the service for which it was installed, until it has reached the end of its service life. Reasoning from this standpoint it is contended by some that there is no depreciation in the plant as a whole if it is adequately and consistently maintained. As to most units which undergo actual deterioration which is measurable, the rate must generally be determined upon the basis of experience as to service life, considering this life, however, only in connection with the estimated time of replacement by reason of actual deterioration and not in connection with any of the other five replacement causes heretofore mentioned.

Some units of plant undergo actual deterioration to a very limited degree, and for some of these it is such as to be practically not observable or not determinable by any positive method, for the reason that there has not been full experience as to service life. As to these units a long service life, namely, fifty to one hundred fifty years, is generally assumed and the annual deterioration is thus strictly an estimated rate for such units of plant. With respect to these units the other five uncertain elements are far more important in their effect upon termination of service.

The theoretical annual depreciation of plant as a whole obviously is not an exactly determinable amount if the fea-



Purpose of the Reserve

"THE depreciation reserve is not a fund from which to reimburse the owners of the utility for possible future losses in the plant. It is, instead, a reserve maintained solely for the purpose of replacing for continuance of utility service units of the plant which from time to time go out of service . . ."

ture of deterioration only is considered; on the contrary, it is an amount which in substantial part is an estimate, a composite of many estimates relating to the several units and groups of units in the plant.

The measure of deterioration is a combination of several factors, nearly all of which are approximate estimates and very few of which can be established with reasonable accuracy. Among these the average service life is a factor which can be estimated for certain units of property, such as poles, if only the physical deterioration is considered, but in such a determination it is difficult to find an exact length of life with the several other uncertain elements which may affect it.

As to other units of property there is no actual depreciation, or the deterioration is so slight that it cannot be measured by observation or determined in any other manner, not even on the basis of complete experience as to service life. All such other units of property from the sole standpoint of physical condition are perfect or very nearly so, and in every case function to render adequately the service for which they are installed.

2. Inadequacy of plant units necessitates replacement so that adequate service may be continued. Such replacement occurs from growth of the demand for the utility's service requiring increased facilities before the estimated service life has expired, but this inadequacy is altogether different from extensions of plant or increase of production or other facilities which are distinctly additions involving new capital investment.

3. Change in the art and obsolescence may require replacement of plant units to maintain adequate service or efficient operation, or both. Such changes arise from conditions affecting production and distribution facili-

ties and methods of operation of the utility necessitating installation of new units to permit more efficient and modern economical conduct of the service.

4. Loss of or damage to plant units caused by accident may arise from fire, explosion, internal defect, external contact, or some other cause quite beyond managerial control. Any such destroyed or damaged units must be replaced to permit continuance of dependable service.

5. Loss of or damage to plant units caused by act of God may arise from flood, snow, rain, ice, wind, lightning, earthquake, or any two or more such causes. Replacements of such units must be made for continuance of dependable service.

6. Replacement of plant units which may be required beyond managerial control may be changes made to comply with orders given by competent authority, to maintain satisfactory public relations, or due to other causes not hereinbefore specified, but all beyond managerial control.

NOT one of these five uncertain elements affects in the slightest degree the progressive physical deterioration of the property, nor does any one of them affect at all serviceability of the plant or any unit until the time of replacements comes, and yet they are all important factors in determining the annual accrual for depreciation reserve.

The time of occurrence of any one of them cannot be determined on the basis of experience. It is merely a fair guess as to when the replacement may be required. Any one of them is likely to be an unpredictable complete extinction of property units. Two or more may occur at the same time. There may be an early repetition of any one. Any two or more of them may occur with little time between.

It is of extreme importance to provide in the accrual of reserve for replacements due to all these indeterminate factors so as to meet the extinguishment of capital investment which occurs when the blow falls. These causes are likely to be far more destructive than deterioration. There is usually an immediate interruption of service. They are therefore obviously more important to meet than the comparatively unimportant factor of deterioration, which can be largely offset by adequate maintenance.

The consideration of deterioration only—or actual depreciation—and failure to recognize the other factors bearing upon the extinguishment of capital invested in facilities that must be replaced, is a very serious error. Management and regulation must give full consideration to all these uncertain factors in providing for a reserve to insure the continuance of service.

SINCE the value of the plant to render its purposeful service is not affected by any of the factors used in determining the annual accrual for depreciation reserve, it is quite improper to consider that these same factors affect the per cent condition of the plant.

It is thus obvious that the per cent condition of the plant may vary materially from the percentage ratio of the original cost less the depreciation reserve to the original cost; the per

cent condition of the plant will be the higher if the property has been properly maintained, and only if maintenance has been seriously deficient would it be lower.

Since the reserve for depreciation is for the replacement of portions of the plant, it is usually established by consideration of the original cost of the depreciable property; that is, the property which may be subject to replacement for any of the causes which have been mentioned, from deterioration to replacement required beyond managerial control, inclusive.

However, in case the original cost of depreciable property as shown in a utility's fixed capital account differs substantially from the fair replacement cost thereof, the utility's management, in the exercise of its discretion, may deem it advisable to consider the amount of the depreciation reserve and to determine the amount of the annual accrual thereto in the light of a cost of replacing the depreciable property, giving due regard also to appreciation, and at the same time making fair deduction for loss of service use in the plant, which has been referred to as the investor's loss distinct from depreciation.

PROPER and sufficient maintenance of the utility plant to a large extent offsets the actual deterioration of the physical property. If the plant is not adequately maintained the actual deterioration may be increased and to a greater degree if maintenance is seriously neglected. The allocation of charges to maintenance or renewals cannot be made with absolute certainty because some of the work is in a twilight zone and might be classed as either without violation of sound accounting rules. For this reason some utilities have adopted as a measure of determining the annual accrual for depreciation reserve the combination of this amount and the maintenance expenditures as compared with the total operating revenue, this percentage ratio being generally a fair guide though it might be more logical to use as the denominator the amount of fixed capital or the original cost of the used and useful property. In any case, however, the determined percentage ratio should be considered as minimum for any one year and it should be increased above this for every year whenever under fair and reasonable rates the earnings are sufficient to warrant.

The depreciation reserve generally is not in cash or invested in separate funds; it is commonly invested in the utility's plant and equipment, and thereby effectively safeguarded so as permanently to sustain a sound financial condition which will permit the utility to accomplish such necessary financing on the best possible terms.

¶ "THE *determination of a fair and reasonable amount for the annual accrual to the depreciation reserve and the fair and reasonable amount for the reserve cannot be accomplished by any absolute or fixed method, and in acting on a fair and reasonable basis the commission must consider all of the variable elements affecting its determination.*"

NO HARD AND FAST RULES FOR DEPRECIATION RESERVE

THOUGH the determination of the amount for annual accrual for depreciation reserve and of the amount which should be in this reserve is primarily a function of management, both amounts are subject to review by the regulatory commission; and in performing its regulatory duties the commission should express its views as to the adequacy, inadequacy, or excessive amount of each of these items, and, if not in proper amount, should prescribe fair amounts by order if necessary. The commission must be mindful of the responsibilities it assumes in making these as well as other orders, for it will eventually be held responsible for its errors if service fails and the utility management has been prevented from maintaining a sound financial condition.

The amount of annual accrual for depreciation reserve cannot be determined with precision. As primary indication of the necessary minimum, the composite estimate of annual deterioration in the plant may well be taken, basing this estimate upon the combination of estimates for all the units of the plant which are subject to deterioration or loss of service life. This, however, should be supplemented with consideration of the amount in the reserve and of the investment in depreciable property and the general condition of the plant. The amount of expenditure for maintenance also is a factor, as well as past and possible future retirements of units resulting in reduction of the reserve. The outstanding securities and notes and necessary amortization or desirable reduction of indebtedness may also be important considerations.

Failure to recognize all of these features may result in an undue burden upon ratepayers or upon the utility or both.

A REASONABLE determination of the amount of annual accrual for depreciation reserve will be reached by giving greater weight to the possible effect upon rates than to consideration of its amount in any relation to the value of the property for rate-making purposes.

With the wide variations to be found between utilities in the ratio of depreciation reserve to fixed capital or original cost, it is obvious that managements, even those skilled in efficient operation, have widely varying ideas as to accruing this reserve. It is clear that utilities operating in different sections of the country must meet varying climatic and other conditions which affect both maintenance and renewals. Any attempt at standardization would be detrimental and might result in a serious situation not only from a financial standpoint but also from that of service and rates.

It is doubtful that any utility's depreciation reserve is now so large that a commission would feel justified in recommending discontinuance of the annual accrual; possibly in a few extreme cases where the reserve is large the annual accrual might properly be reduced. On the other hand, most utilities probably have a depreciation reserve which appears inadequate and in such case the annual accrual should, if possible, be increased.

IT is impracticable to determine any firm rules as to depreciation reserve. This is altogether a matter of sound business judgment and each

utility in itself presents almost a unique situation requiring separate and special consideration and treatment. Only in this way can fair and reasonable results be attained for the consumers of the utility and its owners. The adoption of any fixed method must be avoided.

In conclusion, the amount of annual accrual for depreciation reserve has no permanent relationship to the current condition of the plant. It must be determined on the basis of sound business judgment of all factors including its effect upon rates. No specific theory can be adopted without adverse effect in some instances upon the utility's financial situation and its ability to render adequate and continuous service, or without adverse effect in other instances upon the patrons in shape of unduly high rates or inadequate service.

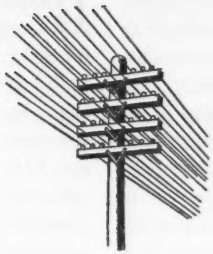
The accruals should at all times be all that the revenue can reasonably bear under all the considerations mentioned unless or until the amount accrued becomes fairly adequate to meet all the contingencies of capital extinction. In that event the amount of accruals should be progressively reduced until the reserve is deemed fully adequate, when it might be discontinued, though it is difficult to believe that this last situation can or ever will be presented.



When Every Knock Is Not a Boost

"WHAT *would have been the record of the last seven years if the utilities had been permitted to expand with confidence in accord with their prospective business? What effect would that have had on the durable goods industries? This is in a partial way answered by what took place in the period from 1921 to 1930. Replacements take a large part of the capital—the additional capital put into this industry which has such a large capital investment related to its annual income. But expansion beyond the replacement is needed in the industry. Not by gesture but by deed, not by breathing spells but by boosting spells should the utility business be given an opportunity to move ahead. I would like to see the policies of the government, both state and national, changed to ones which are not restrictive but promotional.*"

—L. R. KING, *President,*
Iowa-Nebraska Light & Power Company.



The FCC Telephone Probe Goes Out like a Lamb

The recently completed investigation of the telephone industry by the Federal Communications Commission has had a varied career. Ordered by Congress in March, 1935, the tone of the investigation has shifted between drastic severity, temperate reasonableness, occasional apathy, and rumored discord. Here is a general analysis of this interesting and important development in the annals of utility regulation. The author, a Washington observer who has followed the investigation closely from the beginning, also ventures some speculation as to the outcome of the proposals contained in the final report of the commission to Congress.

By FRANCIS X. WELCH

IF one wanted to be a little flip in summing up the recently completed FCC telephone investigation, a one-line description would be that its bark was worse than its bite. The bark in this case was the threatening publicity which resulted from the "disclosures" of Bell system practices during the special investigation hearings, and more particularly from the preliminary document known as the Proposed Report, released April 1, 1938, under the sponsorship of Commissioner Paul A. Walker. The bite was contained in the final report of the full commission released over a year later—June 14, 1939.

Even the final report does considerable barking throughout the factual review of the investigation evidence, which takes up the bulk of the 900-page mimeographed document. But, after all, it is in the conclusions and recommendations for action that we find the real bite of the commission, to the extent that the report has any teeth in it at all. A fair judgment of this most important section of the final report compels the conclusion that there *are* teeth left in it, and some pretty sharp ones at that.

But the most formidable cutters and grinders — the real saber-toothed proposals with which the Walker report bristled—have been carefully withdrawn by the full commission. Left behind are only the marks in the form of critical discussion and scolding comment.

IN truth, the degree of moderation indicated by the actual recom-

mendations of the final report caused considerable surprise. For example, some time after the Walker report was released, this writer undertook, in a published article,[1] to speculate as to what the final report would contain and what Congress might then do about it. In the course of this article there was a suggestion that the full commission would go along with Commissioner Walker in demanding stricter regulation of Bell's depreciation policies. The basis for this prediction was the rather strong *prima facie* case which the FCC special investigation staff had apparently built up on the inconsistency between depreciation reserves of the Bell system companies as compared with the claims of these same companies in particular rate cases with respect to accrued depreciation.

OF course, this was not a new regulatory problem and the Bell companies have not been the only kinds of utilities which have tried to have their depreciation cake and eat it too. However, the commission in its final report simply expressed the general thought that the commission should prescribe rules which will bring depreciation charges more in line with other elements of the cost of telephone service. It may be that the FCC decided to pass lightly over this item with the idea of leaving a more detailed declaration of regulatory policy in the hands of a special committee which is now working on depreciation. But the fact remains that no suggestion for specific action on depreciation found its way into the final report to Congress.

[1] "What Will Come of the FCC's Telephone Investigation?" By Francis X. Welch. PUBLIC UTILITIES FORTNIGHTLY, Oct. 13, 1938.

BEFORE going into an item-by-item comparison of the final report with the Walker proposals, it might be enlightening to review briefly the background of this investigation and the situation within the FCC during the 14-month interim between the release of the Proposed Report and the submission of the final report. The agitation for a special investigation of the telephone industry came to a head during the early days of the first New Deal. At that time, considerable political hostility against public utilities generally had been generated in Washington. Most of this was directed against the power industry but there were enough critics of the telephone industry within the administration's high councils to utilize this general atmosphere to obtain, almost without opposition, congressional approval of the joint resolution to investigate the Bell system.

At that time the FCC, which was given the task of conducting the investigation, was itself a newly created body—reorganized on a much broader scale out of the remains of the old Federal Radio Commission. It is not surprising that this baby commission decided to profit by the experience, such as it was, of the Federal Trade Commission, which was then entering the final phase of its somewhat sensational 8-year investigation of the electric power industry.

In utilizing this model the FCC not only followed the *ex parte* methods of the FTC, but adopted a procedure which was, if anything, even more one-sided. This procedure was to keep Bell pretty well gagged during the investigation, except when telephone executives were summoned to give

testimony against their own industry. Even under such circumstances, the gag was removed only enough to let the witness answer what he was asked —no more, no less. Cross-examination and direct evidence for the defense were not allowed.

Furthermore, in the beginning the investigation was put into the hands of rather zealous young men of pronounced reform temperament. As a result of this, the telephone industry, including its numerous stockholders, began to make an outcry about unfair procedure which inevitably had repercussions, not only in Congress, but within the commission itself.

AND so by the time Commissioner Walker released his Proposed Report, which was based entirely upon the evidence and testimony taken by the special staff, there were widespread grumblings being heard about the "Moscow trial" and "witch-burning" methods that had been employed, especially during the first year of the investigation.

This probably explains the long delay in getting out the final report. Several commissioners, who made no secret of the fact that they were uneasy over bitter complaints about the *"ex parte"* nature of the investigation, were doubtless unwilling to go along

Former Predictions of This Author on the Outcome Of the FCC Phone Probe

1. *"It is virtually certain that the final report of the whole commission, which is expected to go up to Congress during its next regular session, will be a substantially different document than the so-called Walker report."*
2. *"The FCC doesn't object to Bell's monopoly as such. What it does object to is having the control in New York. So instead of hacking the arms off the octopus, we should simply change his address to Washington. And instead of divorcing Western Electric from AT&T, we should simply let mother-in-law (FCC) come to live with the family and supervise the intercorporate relations."*
3. *"As for the recommendation that the FCC be allowed to supervise Bell's profitable side-line ventures into nonutility enterprises, . . . it is doubtful if the whole commission will go along."*
4. *"Most important is the Walker report proposal that the FCC be given authority to 'approve or disapprove all Bell system policies and practices promulgated by the central management group of the American Company.' The commission as a whole seems likely to kill this recommendation or emasculate it . . ."*

(*Excerpts from article in* PUBLIC UTILITIES FORTNIGHTLY, *Oct. 13, 1938.*)

with the more drastic Walker proposals which were premised solely upon evidence taken under such conditions.

But the commission as a whole got into much more hot water with Congress on other matters, because of the frequent outbreaks of friction within the commission. This internal discord reached the point where President Roosevelt himself, after attempting to restore harmony by dispatching his regulatory "trouble shooter," Chairman McNinch, to the FCC chairmanship, finally asked Congress to do something about reorganizing the basic set-up of the commission. Republican critics of the FCC in Congress followed this up with proposals of their own for reorganization and investigation.

The House Appropriations Committee even took the unprecedented step of cutting off the FCC without a cent in the regular independent offices appropriations bill. And even as these lines were written, no appropriation had been made available, notwithstanding the fact that the FCC had left only enough funds to continue in operation until July 1, 1939.

It is not surprising that the commission would react to this general censure of its lack of harmony by making every effort to get out a unanimous report on the special telephone investigation, which was long overdue.

BUT to arrive at such a unanimous report, it was necessary for both the left and right wingers within the FCC to make concessions. Those commissioners who had questioned the soundness of the special staff evidence apparently solved their difficulty by checking and double checking the basic evidence of the investigation staff against the analytical comment filed by the Bell system in reply to the Proposed Report. Strict regulationists, on the other hand, had to stand by and see the more drastic proposals of Commissioner Walker thrown overboard. Thus was unanimity obtained to the surprise of most outsiders. Thus were the principal teeth drawn from the Walker report.

The most prominent tooth which the full commission removed from the Proposed Report was Commissioner Walker's recommendation that the FCC should be given power to review, approve, or disapprove Bell system policies and managerial practices. The item was conspicuous by its absence from the final report. So was any mention of Commissioner Walker's more sensational suggestion that the Bell system rates might be cut 25 per cent without hurting net profits. However, in its place there was a sharp comment about excessive earnings of Bell's manufacturing unit, Western Electric, and a broad hint that the present $9 common stock dividend policy of the AT&T was no longer "an economic necessity" in view of the prevailing cost of money.

The additional observation that AT&T dividends "are not significant in the rate of return for operating companies" was simply the restatement of the well-known regulatory principle.

ONE striking difference between the Proposed Report and the final report was in the general tone of the respective documents. The Proposed Report was almost entirely critical of the industry. It invariably ignored



Managerial Policies and Practices

"THE most prominent tooth which the full commission removed from the Proposed Report was Commissioner Walker's recommendation that the FCC should be given power to review, approve, or disapprove Bell system policies and managerial practices. The item was conspicuous by its absence from the final report."

Bell virtues and emphasized Bell defects. A disinterested reader of it simply could not avoid the impression that there is very little good about the Bell system—that it was quite wrong from the start and ought to be made over and (most important of all) the FCC should be given the reconstruction job.

The final report was quite temperate, even in its most forthright passages censuring various Bell practices. Furthermore, the report contained quite a bit of commendation. It pointed out that the Bell system was sound, strong, and conservative in its financial structure, and, unlike some of the holding companies of the power industry, its intercorporate pattern was quite simple, especially for purposes of regulation.

The commission accepted Bell's strong position in the telephone field, not as a suspicious monopoly, but as an economic necessity which simply requires effective governmental regulation. The commission took the view that it would be unwise and unrealistic to attempt to break up the Bell system or to establish a stronger independent telephone industry of a caliber which would check or challenge Bell's present dominating position in the telephone field. Other complimentary remarks about Bell's managerial skill, high technical accomplishment, and economic foresight were strewn through the final report.

ON the whole, it would appear that 10 out of 18 recommendations of the Walker report were eliminated in the final report. Seven were approved, at least in substance, and one was so greatly modified as to make it something entirely different from the original proposal.

This last item has to do with the FCC plans for Western Electric, which came in for most of the real fireworks in both reports. In fact, the final report scolds the Western Electric Company almost as severely as the Walker

report does for alleged faults and omissions.

Commissioner Walker had recommended that the FCC should be given authority to exercise direct regulation over the cost of telephone equipment. This would have put Western Electric, which purports to be only a manufacturing concern, in the category of a public utility. The final report does not go so far. It recommends, however, that the FCC be given authority to prescribe a cost accounting system for all telephone companies which have corporate or contractual affiliation with telephone operating utilities.

The idea seems to be that if it were definitely and clearly shown just how much and in what manner Western Electric profits are created, the abuses complained of would disappear. However, some see in this proposal—which is the most significant of all the 9 recommendations of the final report—the entering wedge of Federal regulatory authority over Western Electric and fear that once the start is made, complete regulation will eventually develop. It is also noteworthy that this proposal would apply not only to Western Electric but to the independent manufacturing industry.

PRESS reports and other published summaries have communicated the gist of the 9 recommendations mentioned to most persons interested; so a detailed duplication here is probably not necessary. In brief, the commission proposed, in addition to establishing cost accounting for the manufacturing industry, legislation to empower the FCC: (1) to regulate Bell security issues; (2) to prohibit the abandonment of interstate operations; (3) to supervise Bell consolidations, mergers, and sales; (4) to order open exchange of communication patents in the public interest; (5) to assess the telephone industry for the cost of its regulation.

Also, the report suggested two minor changes in the Communications Act to clarify FCC jurisdiction over joint interstate rates and telephone relay service for chain radio broadcasting networks.

Important proposals of Commissioner Walker, which were dropped in the final report, included (in addition to the two items on managerial policy and depreciation mentioned above): (1) control of FCC authority to approve intercompany contracts and intercompany financing; (2) prohibition of Bell excursions into other commercial fields than communications; (3) a congressional declaration adopting the original cost rate base theory; (4) antigambling telephone legislation; (5) FCC power to supervise conditions surrounding the sale of stock.

The full commission's only action on Commissioner Walker's accusation of Bell lobbying and propaganda was a pious denunciation of improper pressure on state commissions and state legislatures, and a frown upon overexpensive "cultivation of good will." This was coupled with the rather pointed observation that the propriety of charging publicity costs to operating expenses "is a question for the regulatory body which may be faced with this problem in a specific rate proceeding."

THE full commission did not definitely concur with Commissioner Walker's earlier suggestion that Con-

gress should appropriate funds to continue the investigation and to establish a special rates and research division. However, the final report did emphasize the need for continued and effective Federal regulation of the telephone industry and the development of a skilled staff to match the "experience, expertness, and continuity of management attained by the American telephone industry." It further indicated that the FCC would follow up with a separate request for additional funds to bolster staff regulation of the telephone industry.

Whether this will develop exactly along the lines suggested by Commissioner Walker remains to be seen. But there is no doubt that the entire commission is convinced that the public importance of the telephone business warrants increasing Federal regulation, not only to protect the users of the interstate service, but also to supplement state regulation of intrastate telephone service by the development of a policy of close Federal-state coöperation.

The final report spoke approvingly, but without making any specific finding, concerning the Walker report proposal that the Bell's system security issues should be handled on a competitive bidding basis. The full commission appeared to sidestep, however, the Walker report suggestions for detailed regulation of the Bell pension system for employees. (The report did observe that excessive pensions might be a subject for consideration in rate cases, which is hardly a new thought in utility regulation.)

As might well have been expected, the full commission sought to justify the congressional expenditure of $1,500,000 for the telephone investigation by pointing to telephone rate reductions aggregating more than $30,000,000, "directly resulting from the investigation." The FCC figured that this was a return to the taxpayer of more than 20 to 1, which sounds fine as far as it goes, but it is hardly fair to the efforts of the state commissions which have also been working at the job of telephone regulation and obtained appreciable results by way of rate reductions long before the FCC was born.

However, it is generally to be expected that administrative agencies will take all the credit they can when reporting to their legislative branch. Certainly, the FCC is entitled to take the main bow for chasing the now almost extinct but once troublesome monthly surcharge for the hand-set or so-called French-type telephone.

The question now arises as to what

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¶ "THE *final report was quite temperate, even in its most forthright passages censuring various Bell practices. Furthermore, the report contained quite a bit of commendation. It pointed out that the Bell system was sound, strong, and conservative in its financial structure, and, unlike some of the holding companies of the power industry, its intercorporate pattern was quite simple, especially for purposes of regulation.*"

will come of this final report. Political experts are unanimous in their verdict that nothing will be done about it at the current session of Congress. There are even those who venture the surmise that Congress won't do very much about this report in the session beginning in January, 1940. That is an election year and Congress is usually very sensitive about getting into any more controversial matters than it has to. The fact that the AT&T stockholders are so numerous (the widespread diversion of this stock is freely admitted in the report) might make Congress hesitate, if the Bell management could really make out a case against the recommendations strong enough for the security holders to rage.

HOWEVER, with the exception of the proposed regulatory innovation of subjecting the manufacturing industry to utility accounting requirements and the handing over of security issue regulation of the telephone industry to the Federal commission, there appears to be little in the final report's specific recommendations to which the industry could make an impressive objection. It is this writer's guess that the next session of Congress will be inclined to stall off action on the two major proposals mentioned. It will approve the rest of the FCC program readily enough. The patent exchange idea may also be stalled pending reaction from the Patent Office and the O'Mahoney (PNEC) Committee.

What will happen to these two more controversial proposals in the succeeding Congress, if they are thus left unacted upon, will depend to a great extent, of course, upon the turn of the political wheel in the general elections of 1940. Over the long run, however, it seems inevitable that Congress will increase FCC control over the Bell industry from time to time. This is a general trend quite independent of the special telephone investigation, which merely gives it more momentum at this time. And with the coming of this eventual regulation, the earning power of the Bell system will not be so lush as it has been in the past. That is the eventual result of regulation. It has a way of pinching a penny here and making a restriction there. It curbs the golden flow into the corporate sock, even after the tax collector and increasing operating expenses have done their worst.

This won't happen today or tomorrow. It is simply there in the cards for the future. Relatively speaking, Bell securities will always be among the bluest of the blue chips—as far ahead as we can possibly see.

A GENERAL summation of this special telephone investigation, which literally came in like a lion and went out like a lamb, was reflected in remarks overheard at a Washington club the day after the final report was released. A certain FCC official, who was quite pleased over the surprising unanimity of the report, met a telephone company man and began joshing him. "And you were so sure," the FCC man gloated, "that the commission would tear itself to pieces over that thing and send it to Congress with at least two dissenters."

"Heck! I don't see what you are bragging about," replied the telephone man. "After looking at that report I believe I would be almost willing to sign it myself."

Financial News and Comment



By OWEN ELY

Power Famine Fears Decried

General Charles Keller, a director of the Public Utility Engineering & Service Corporation (service unit of the Standard Gas and Electric system), in an address before some two thousand utility executives at the recent convention of the Edison Electric Institute, declared that no power shortage is likely to result in the United States if this nation becomes involved in war. Expressing the opinion that it would be "unwise to attempt to decide the localities in which shortages of power will occur and their amount and to install the indicated additional capacity at those places before we are engaged in war," Mr. Keller held that under all circumstances the control over power production should rest with the local operating utility, with Washington entering "to the least extent necessary to protect and supplement the supply of power." (See Public Utilities Fortnightly, June 22nd issue, p. 872.) He further stated:

> In my opinion, it will be sufficient preparedness to complete, in time of peace, detailed designs for generating units of agreed size, together with accurate bills of materials and schedules of delivery for the various items in accordance with dates of completion that have been coördinated with the other requirements of the war program. In this way no money will be spent on needless or badly located plants while, under existing plans for war control, ample time will be available to install additional equipment for the generation, transmission, or distribution of energy, or for two or more of those purposes, when and where it is needed.

Assistant Secretary of War Louis A. Johnson, in the June 8th issue of the Fortnightly, pointed out that in the World War the demand for munitions in such areas as Buffalo, Philadelphia, and Pittsburgh resulted in serious power shortages. The National Defense Power Committee, headed by Colonel Johnson, conferred with the executives and engineers of the utility companies and suggested that 1,000,000 kilowatts' additional capacity should be installed—a program immediately adopted by the utilities and now well on the way to completion. Other suggestions made by the committee also received a whole-hearted response. Nevertheless, Colonel Johnson's last paragraph—"We have merely scratched the surface. There is still a great deal to be done"—seemed somewhat enigmatic.

A recent Federal Power Commission report, citing ten cases of "major breakdowns" of electric service in various parts of the country and stressing the fact that such breakdowns interfere with interstate commerce, painted a more disturbing picture of the administration attitude:

> As loads build up and generating station capacities and machine sizes increase, while the power is still handled at switching stations that remain in substantially the same condition as when originally built during the war or post-war period, the equipment at these points becomes progressively more inadequate, and it is reasonable to suppose that breakdowns, such as those discussed above, will become increasingly common unless there should be a corresponding and speedy modernization of structures and equipment at all switching points.

There have been disquieting fears in recent months, due to various developments or statements in New Deal quarters, that the administration is planning a huge utility expansion program for next year, principally in eastern territory (hitherto neglected) under the

guise of a defense program, through the medium of PWA expenditures or loans —on the ground that the utilities have failed to step up their capital expenditures. The revival of the St. Lawrence waterway project, combined with the sudden moves against Niagara Hudson as a "power trust," seems to fit in with the general build-up for such a program, although it seems incredible that the administration could hope to oust Niagara Hudson from the falls without a long legal battle. These fears have been somewhat assuaged by the moderate, conciliatory tone of Colonel Johnson's article.

Probably everyone knows that, at the behest of President Hoover, the utilities in 1930 launched an expansion program which built up capacity far in excess of their needs, and that this accounts for the decreased expenditures in recent years. The greatly increased efficiency of modern installations, plus reductions of peak loads through interconnection, is another factor in current relatively low appropriations. Thus while new capital appropriations in 1938 were only $473,000,000 compared with $919,000,000 in 1930, capacity was increased 1,370,059 kilowatts compared with an increase of only 1,026,987 in 1930. *Thus, if last year's increased capacity had been installed at the same kilowatt cost as in 1932, the 1938 expenditures would have amounted to $1,220,000,000—over two and one-half times the actual cost.* These results were accomplished not only through the rapid gains in the efficiency of steam generating equipment, but through installing additional generating equipment in power houses containing available space, so that construction of new buildings was avoided.

These figures indicate the fallacy of comparing average annual capital expenditures in the 1920's with those in the 1930's and deriving thereby the estimates of several billion dollars by which the industry has been reported "underbuilt."

G. F. Wittig, statistical editor of the *Electrical World*, recently presented in that publication a large amount of statistical and graphic data on the operation of 180 large utility systems in the years 1935-38. Mr. Wittig reported as follows:

> Of the 145 electric light and power systems in the United States [included in the study] 122 supplied data from which the utilization factor (ratio of generator peak to generator capacity) could be compiled. . . . Half the companies had a peak on the generator plants in 1938 that did not exceed 70 per cent of the installed capacity. Thus, considering the country as a whole, there seems to be a comfortable margin of capacity. No allowance has here been made for the fact that peaks are not simultaneous. On the other hand, the country's total capacity could be used only if interconnections were sufficient to enable loads to be shifted at will. While these two considerations tend to equalize, it is impossible to define their magnitude. Further, about a third of the capacity is in water power; this may not be fully available at the time of the peak. The 70 per cent median does, however, serve as an indicator of nation-wide conditions. . . . Moreover, the margin was a little larger in 1938 than in 1937, when the median utilization factor was 72.7 per cent. Apparently new construction fully kept pace with peak requirements in 1938, but provision must be made for ever higher peaks in the years to come.

Judge Healy's Views on § 11

THE recent special utility number of *The Annalist* contained an article by Commissioner Robert E. Healy of the SEC entitled "Progress under Holding Company Act; Prompt Action under § 11 Probable." While Commissioner Healy admitted that there had been a long delay over § 11, and some doubts regarding its interpretation, he pointed out that other sections of the act relating to the issuance of securities, regulation of service charges, registration of holding companies, and compilation of financial data had been successfully administered by the SEC in collaboration with utility executives. Regarding § 11, he stated:

> Companies which see their way clear to compliance with § 11 can file voluntary plans for the approval of the commission. Companies which face more complicated questions can await the institution of proceed-

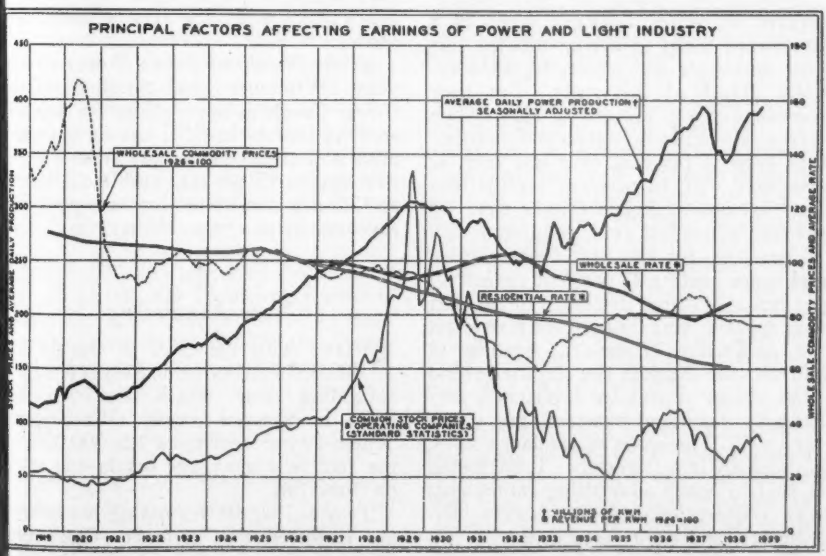
ings by the commission to determine the application of the statute to the specific case.

The important thing is to make a start on the problem. The border-line cases need not be considered first. There are any number of clear-cut situations where the effect of the statute is unmistakable. For example, there are many instances throughout the industry of small isolated properties, remotely owned, which could easily be transferred to neighboring systems where they would occupy a more logical position, and where they could be operated more effectively and more efficiently, and could give better service at lower rates with higher profit. These and other things the industry can do. For the commission, I think I may say that we will shortly begin to invite the executives of individual companies to confer with us as to the next steps to be taken under § 11.

Judge Healy's views, as here quoted, contribute little toward clearing up the precise meaning of § 11. The views expressed by former Chairman Douglas are now of less significance because of the new make-up of the commission. The American Gas and Electric Company's integration plan, filed with the SEC some time ago, seems generally regarded as a test case, although the system is one of the soundest of the holding company groups. The SEC has explained its delay on this case as due to the necessity for compiling additional data, and hearings are expected in the latter part of September.

IN a more recent address before the Harvard Business Alumni Association, Judge Healy said that, although many of the major public utility holding companies were in "drastic" need of reorganization and recapitalization, an arrearage of nearly one-half billion dollars in preferred dividends constituted a serious obstacle to present financing. He felt that the financial rehabilitation of the utility industry was the task now facing the commission.

He warned that although the SEC is trying to administer the Holding Company Act as a means for rejuvenating the industry rather than as a "death sentence," it should not be expected that defunct holding interests can be raised from the dead or that value can be breathed into securities which should not have been issued in the first place. He also made the statement quoted on the following page:



From The Annalist

It does not mean that there is to be a dictatorship over the utility industry. It does not mean the nationalization of the utility industry. Whether you would oppose nationalization of electric power or whether you would favor it, you will not find it in the Holding Company Act or in its administration.

He declared the act did mean the "lawful regulation in the interest of investors, consumers, and the public, and a return to old-fashioned American conservatism and fair dealing from which we strayed in the roaring twenties. It recognizes and does not impede the earning of proper profits."

Power Output Gains Sharply

ELECTRIC power production, in the week ended June 10th, showed a gain in the central industrial region of 17.5 per cent and for the country as a whole of 13.3 per cent. The seasonally adjusted index published by *The New York Times* advanced to 97.5 compared with 95.4 in the previous week. The index is only slightly below the high level reached in January (98.8).

Sales of electrical goods (with the exception of water heaters) were in a downward trend in earlier months this year, although still averaging substantially ahead of last year. But they showed a sharp upturn in May, when refrigerator sales to dealers and distributors were 55 per cent over last year, as compared with 14 per cent for the first four months. Electric ranges were 33 per cent above last year, compared with 18 per cent for the first four months, and water heaters 25 per cent against 14 per cent. Washing machines in the first four months were 38 per cent above last year and radios 17 per cent, but ironers and vacuum cleaners ran slightly behind 1938. Sales of smaller appliances, particularly fans and toasters, are doing very well. The spurt in appliance sales, particularly in refrigerators, is attributed in part to heavy advertising campaigns, with coöperation between dealers, distributors, and utility companies.

The continued stimulus to domestic consumption of electricity through appliance sales, which in turn will permit a further gradual decline in average domestic rates, is the utility industry's best answer to Federal "yardstick" proposals and campaigns for huge government projects.

Survey of Depreciation Policy

THE SEC is conducting a broad investigation of the depreciation problem, making a general survey of the reserves of large utility systems. The commission is said to be exerting pressure on companies that have depreciation policies or reserves and expenditures for maintenance and repairs that it regards as inadequate.

Two methods are being followed in order to maintain what the SEC regards as adequate standards. One is to attempt to persuade a utility appearing before the SEC in connection with a proposed security offering to write an "adequate" depreciation and maintenance policy into the indenture. The second is to condition approval of proposed issues on maintaining a depreciation and maintenance policy which the SEC believes adequate.

In the Northern States Power Company (Wisconsin) and Southern Utah Power Company applications for sale of security issues, the SEC has set depreciation and maintenance standards—in the first case at 15 per cent and in the other at 17.5 per cent of total gross operating revenues after certain deductions.

New Financing

FILING with the SEC of the $135,000,000 Pennsylvania Power & Light refunding issue, which has been delayed, is expected shortly. Washington Water Power registered $22,000,000 3¼ per cent first mortgage bonds due 1964 on June 8th.

Two California refunding operations are expected this summer—California Water & Telephone and Southern Cali-

fornia Gas. Other prospective refundings include $32,000,000 Central Power & Light 5s of 1956, $12,900,000 Iowa Southern Utilities 5½s, and $5,424,000 Kansas Power Company 5s of 1947. The latter would be refunded through an issue of $5,000,000 25-year 4s and a small amount of serial debentures.

Oklahoma Natural Gas is reported studying the refunding of $17,000,000 first 4½s and $10,000,000 debentures.

The $7,000,000 Consolidated Gas, Electric Light & Power Company 30-year first mortgage 3s, offered June 7th at 105, proved very popular, advancing as high as 108.

A syndicate headed by Harris, Hall & Company on June 6th offered $18,000,000 West Texas Utilities Company first 3¾s due in 1969 at 101¾. The *New York Sun* points out that, while the SEC had required the company to give up its regular banking connections for this financing, the fact that the issue went to an immediate premium of 1¾ points showed that the company did not necessarily benefit by the new contact. The newspaper regarded this outcome as merely another illustration of the difficulties of judging the market in advance when prices are rapidly changing. "As the rule works, when the market swings in favor of the borrower, he does not get a better price, as minute-to-minute changes cannot be made. On the other hand, when the market swings against the issue, the underwriter has to pocket his loss. The theory under which the SEC operates would seem to call for review."

THE SEC has approved the issuance of $2,000,000 Oklahoma Power & Water Company serial 5-year 3¾ per cent notes secured by $2,500,000 first mortgage 5s, the issue to be sold to a group of banks. While the commission permitted this financing because it was part of a broader program, it warned that short-term financing of this character is "clearly open to question." This comment is of interest in view of the increasing popularity of this mode of financing.

West Penn Power Company, American Water Works subsidiary, is considering the retirement of $27,707,700 7 per cent and 6 per cent preferred stock, the former being callable at 115 and the latter at 110 (on six months' notice on any dividend date). New preferred stock, probably with a $5 dividend rate, would be exchanged for the old preferred if the directors approve at their July meeting.

Corporate News

HAVING obtained the consent of 89 per cent of the Kansas City Public Service Company first mortgage bonds for the plan of recapitalization, the company has arranged for five banks to act as depositories. Bondholders will receive $300 cash and 10 shares of $3.50 preferred for each $1,000 bond.

Two identical revised plans for reorganization of the Mountain States Power Company, a subsidiary of the Standard Gas and Electric Company, have been received by the SEC. One was filed by the preferred stockholders' committee, and the other by the bondholders' committee. These compromise the differences in the two plans formerly submitted by these groups.

The SEC has announced that Continental Gas & Electric Corporation, a subsidiary of United Light & Power Company, has filed an application for approval of the acquisition of 20,000 shares of Iowa-Nebraska Light and Power Company common stock. The stock will be issued in consideration of the discharge of $2,000,000 of the $3,423,055 unpaid balance of the principal amount of Iowa-Nebraska Light and Power Company's 6 per cent promissory note held by the company.

Columbia Gas & Electric Corporation now plans to drop its affiliate, Columbia Oil, which controls Panhandle Eastern Pipe Line Company, in order to meet objections of the Department of Justice under the antitrust laws.

INTERIM EARNINGS STATEMENTS

	No. of Months Included	End of Period	System Earnings per Share (a) Last Period	Previous Period	Per Cent Increase	Per Cent Decrease
Electric and Gas						
American Gas & Electric	12	Apr. 30(b)	$2.37	$2.31	3%	..
American Power & Light (Pfd.)	12	Apr. 30(b)	5.09	6.30	..	20
American Water Works	12	Mar. 31(c)	.48	.83	..	42
Boston Edison	12	Mar. 31(c)	8.84	8.44	4	..
Columbia Gas & Electric	12	Mar. 31(c)	.39	.59	..	34
Commonwealth Edison	12	Mar. 31	2.30(g)	2.16(g)	6	..
Commonwealth & Southern (Pfd.)	12	Apr. 30(b)	9.17	8.91	3	..
Consolidated Edison, N. Y.	12	Mar. 31(c)	2.08	2.23	..	7
Consolidated Gas of Baltimore	12	Mar. 31(c)	4.17	4.46	..	7
Detroit Edison	12	May 31	7.51	6.08	24	..
Electric Power & Lt. (1st Pfd.)	12	Apr. 30(b)	5.99	10.30	..	42
Engineers Public Service	12	Apr. 30(b)	1.23(h)	.75	64	..
Inter. Hydro-Electric (Pfd.)	12	Mar. 31(c)	5.36	13.03	..	59
Long Island Lighting (Pfd.)	12	Mar. 31(c)	4.34	5.06	..	14
Middle West Corp.	3	Mar. 31	.24	.11	118	..
National Power & Light	12	Apr. 30(b)	1.17	1.32	..	12
Niagara Hudson Power	12	Mar. 31(c)	.53	.70	..	24
North American Co.	12	Mar. 31	1.61	1.77	..	9
Pacific Gas & Electric	12	Mar. 31	2.53	2.68	..	5
Public Service Corp. of N. J.	12	Apr. 30(b)	2.61	2.44	7	..
Southern California Edison	12	Mar. 31(c)	2.18	2.10	4	..
Standard Gas & Elec. (Pr. Pfd.)	12	Mar. 31(c)	4.63	7.41	..	38
United Gas Improvement	12	Mar. 31(c)	1.00	1.07	..	7
United Light & Power (Pfd.)	12	Apr. 30	5.48	7.95	..	31
Gas Companies						
American Light & Traction	12	Apr. 30	1.56	1.65	..	5
Brooklyn Union Gas	12	June 30	3.20	2.22	44	..
Lone Star Gas	12	Mar. 31(c)	1.03	.97	6	..
Pacific Lighting	12	Mar. 31	4.79	3.32	44	..
Peoples Gas Light & Coke	12	Mar. 31	2.95(f)	2.99(f)	..	1
United Gas Corp. (1st Pfd.)	12	Apr. 30(b)	11.09	19.48	..	39
Telephone and Telegraph						
American Tel. & Tel.	12	Feb. 28	8.53	9.31	..	8
General Telephone	12	Mar. 31	1.71(e)	1.62(e)	6	..
Western Union Telegraph (i)	12	Mar. 31(c)	D1.32	.77	..	..
Traction Companies						
Greyhound Corp.	12	Mar. 31(c)	2.01	1.72	17	..
Twin City Rapid Transit	3	Mar. 31	.33	.01	..	..
Systems outside United States						
American & Foreign Pwr. (Pfd.)	12	Mar. 31(c)	6.85	6.88	..	..
International Tel. & Tel. (d)	12	Dec. 31	1.10	1.60	..	31

D—Deficit.

(a) On common stock, unless otherwise indicated following name of company; in some cases Federal surtax not deducted.

(b) Data also available for month indicated.

(c) Data also available for quarter indicated.

(d) Excludes Spanish subsidiaries and Postal Tel. & Tel. Co.

(e) Includes earnings of General Telephone Tri Corp. and subsidiaries from August 3 1938 (date of acquisition).

(f) Before reservation for rate litigation, $6.77 compared with $3.38.

(g) Based on adjusted consolidated net income.

(h) Excluding loss of Puget Sound Power & Light Company.

(i) For four months ended April 30th net loss was $793,632 compared with $1,293,829 last year; for month of April net income was $24,850 compared with a net loss of $214,0 last year; May was expected to show further improvement.



What Others Think



Advantages of Public Utility "Integration"

IN the spring of 1938, Judge F. J. Dunn, general counsel of the New England Power Association, and Mr. Justice William O. Douglas—then chairman of the SEC—were discussing certain problems arising under the Public Utility Holding Company Act of 1935. One of those problems was the question of how the controversial § 11 (b) (1) of the act, relating to geographical integration (also popularly known as the "death sentence") could be administered. Justice Douglas told Judge Dunn that he had heard a number of arguments one way and another on that section (mostly by lawyers), but that he would like to hear the views of technical operating men.

Pursuant to this suggestion, Judge Dunn and associates, aided by officers and technical staff of the New England Power Association, prepared a memorandum which Justice Douglas found on his desk at the SEC some weeks later. In its preparation nobody connected with the SEC had any part, nor any opportunity to pass upon it, nor make suggestions. This lends added significance to the fact that Justice Douglas not only found the document of "more than usual interest" but thought enough of it to write a special preface to accompany its recent publication in the *Harvard Business Review*.

Section 11 (b) (1) makes it the duty of the SEC, as soon as practicable after January 1, 1938, to require registered holding companies to limit their control to companies operating as a single integrated public utility system, except in such special instances where control of "one or more integrated public utility systems" might be authorized.

Reviewing development of the electric power industry in the United States, Mr. Dunn noted four broad classes of electric utility units which came into existence: (1) The isolated local unit. (2) A group of units under common management but not physically connected. (3) A group of units physically connected but separately managed. (4) The integrated system of completely integrated units physically connected and commonly controlled but not corporately consolidated.

THE benefits accruing from such group management have been well known for many years. However, Mr. Dunn tells us that the "proper limitation to the area served by an integrated system, while difficult to establish, is very real." The availability of suitable markets and the economic distribution of load are important considerations. The author found that under ordinary conditions the area served by a single integrated system did not extend over a few hundred miles. The physical limitation of the integrated system thus defined, the author suggested that the service of a central organization (presumably nonprofit) of an integrated system could be made available to the units at much less expense than similar service obtained for isolated units from consulting organizations operating at a profit. Mr. Dunn's article continues with the statement:

> So much is being currently said about the importance of coördinated planning over large areas that little question can remain as to its value. Integration results in very large savings through coördination of the fundamental plans of development of each unit in the area served. This is especially true in an area where water resources are available, as water powers can be more fully

utilized in a large system than in a small one. The load of an integrated system can absorb the large seasonal output from "run of the streams" plants and can justify the construction of reservoirs to regulate stream flow where such practice is sound. Thus, where the various units of an area are completely integrated, each water power can be developed along such lines as are most beneficial to the area as a whole, and each unit in the area shares in the resulting economies.

The author went on to say that an integrated system can accomplish the strategic location of a steam generating plant without burdensome limitation encountered by an isolated system. Nor is benefit of an integrated system to be confined to units which are intraconnected. The article states on this point:

> . . . interconnection makes possible a saving, not only in total installed capacity, but in the peak load prepared for from day to day. This saving in an area of some consequence is considerable. Interconnection alone, however, is not adequate for the complete realization of these savings. It is only by the lodging of responsibility for system service in a single individual that the complete benefits from peak diversity can be obtained. Integration provides the single responsibility without which the complete advantage of interconnection is unobtainable.

Mr. Dunn went on to discuss the importance of central load dispatch, normal maintenance, and free intermingling of engineering and operating forces. Intercorporate relationship in the matter of centralized financing and centralized purchasing was also described as reflecting the economic advantage of an integrated system set-up. Even the protection of workers from accident injury was held to be vastly improved through the constant and effective contacts possible in such a system. Mr. Dunn's article continued:

> In general the central service organization of an integrated system offers to its constituent units a much more comprehensive and intimate service than would be available from the larger consulting firms. Few, if any, of these latter, for instance, would be in a position to supply expert service in such matters as the acquisition of lands and rights of way, and the incidental conveyancing and title work, the solution of problems having to do with safety, and insurance. Services in regard to corporate, financial, and similar problems would probably have to be obtained from firms other than those that would supply engineering and technical services.

The author repeated that geographical limits of successful integration are usually smaller than technical limits of interconnection. He added, however, that the discussion of benefits unique to an integrated system makes these additional limits more clear, even though they cannot be measured in miles. The author concluded:

> So long as additional area can be included without decreasing that knowledge and appreciation, integration has not reached its most effective extent. Thus, we see that in regions of large homogeneous area whose sections are quickly and easily reached, integration can be extended over a broad territory. When due to distance, natural barriers, and absence of quick and certain communication that local intimacy with conditions diminishes, the most effective size has been passed. Then the design personnel become consulting engineers for the units of the system. The operating staff becomes a central bureau supervising in only a general way the local forces by whom the decisions resulting in the day-to-day economy of the system are determined.

Under such circumstances the central maintenance organization loses the intimate character of the family physician and becomes a consulting specialist. Management tends to graduate into absentee landlordship, and the whole system becomes unwieldy and the far-reaching advantages of integration vanish.

PUBLIC UTILITY INTEGRATION. By F. J. Dunn and Associates. (Preface by William O. Douglas.) *Harvard Business Review*. Spring, 1939.

¶ "GOVERNMENT *competition with its citizens constantly increases. Punitive taxes and regulations are imposed to force conformity with centralized conceptions of proper performance.*"

—FRANCIS E. FROTHINGHAM
Member, Coffin & Burr, Inc.



The Salt Lake Tribune

THEY FWAM AND THEY FWAM

Federal Commissioner Finds American Regulation Still on a Fair Value Basis

THE United States Supreme Court cannot be said to have abandoned the traditional doctrine of "present fair value" for "prudent investment" in passing upon the constitutionality of public utility rates in recent decisions, according to Oswald Ryan, member of the Civil Aeronautics Authority, in an opinion recently given in response to the request of a government commission appointed by the President of Brazil to draft regulations for the control of privately owned utilities in that country.

The request followed the filing with

the Brazilian commission of a Portuguese translation of Ryan's oral argument to the United States Supreme Court in the case of the Railroad Commission of California *v.* Pacific Gas & Electric Company, decided last year, in which, as general counsel of the Federal Power Commission, he urged the constitutionality of a public utility rate which would permit a reasonable return upon prudent investment in the utilities' property devoted to public use. The statement had also been made to the Brazilian commission that the American court had in that case overthrown the "present fair value" rule.

The private utilities of Brazil, financed mostly by American and English capital, are vigorously opposing the adoption of the prudent investment method of rate making in Brazil, contending that such a policy would be ruinous to American and English investments due to a 500 per cent depreciation in the milreis (the Brazilian unit of exchange) in the past twenty years.

MR. Ryan's response, which was addressed to Senor Vanor Ribeiro Janqueira of the Brazilian government commission, stated in part:

> I do not believe that the Supreme Court can be said to have abandoned the so-called "fair value" rule for the "historical cost" or "prudent investment" doctrine in either the Pacific Gas & Electric Company Case (reported in 302 U. S. 388, 21 P.U.R.(N.S.) 480) or in any subsequent decision. The court in the Pacific Gas & Electric Company Case did not decide the question whether the rate fixed by the California commission was confiscatory. That case, the court thought, involved the procedural question whether the regulatory body in admitting reproduction cost evidence but regarding such evidence as being without probative value under the circumstances had given the utility the fair hearing required by our Constitution. In oral argument in that case to which I was admitted on motion of the Solicitor General, I took the position that if the California commission had excluded evidence of reproduction cost—one of the major elements to be considered under the "fair value" rule—the commission could not be said to have denied the company procedural due process. I frankly conceded that for thirty-nine years the test of confiscation set by the court had been whether the rate fixed would allow reasonable return upon the "present fair value" of the utility property, but I urged that the court hold that the constitutional requirements would be satisfied if the utility were allowed a reasonable return upon its investment prudently made in the property devoted to the public use. Such a ruling, I argued, would permit the rate-making body to meet the requirements of changing economic conditions by adjusting the rate of return rather than by resorting to the expensive, time-consuming, and unsound method of recomputing the rate base in accordance with the "fair value" method of rate making. This assumes, of course, the existence of a relatively stable currency. In the event of an extraordinary price upheaval which would result in a radically changed level of a more or less permanent character, it would become necessary to establish a new rate base.
>
> The method of rate making which I presented to the Supreme Court is one which takes into account the need of the company for a return that would permit it to preserve its credit and attract new capital into the enterprise. The source of the desired capital would have to be considered in fixing the rate to be allowed upon the ascertained investment. The amount of return necessary to attract such needed capital, however, would be obtained, under the prudent investment method, through a change in the rate of return and not through a change in the rate base.
>
> The court in the Pacific Gas & Electric Company Case did not consider the question of the correct test of confiscation but, instead, dealt with the question whether the commission had granted the company a fair hearing. The court held that since the commission had permitted evidence of reproduction cost to be introduced as well as evidence of historical cost, and had considered such evidence, the company had not been denied due process of law in a procedural sense.

Mr. Ryan concluded from this that in determining whether a utility rate is confiscatory, the cost of reproduction may still be a material factor to be considered under the Supreme Court ruling. By way of support, he pointed to the later decision of the court in Driscoll *v.* Edison Light & P. Co. (28 P.U.R.(N.S.)65).

The Expanding Rôle of Accountancy In Regulation

THERE is no denying the fact that the rôle of the accountant is becoming more and more identified with the technique of up-to-date utility regulation. Too much so, some critics may think, or too expensively so. Be that as it may, the accountant looms in the regulatory picture as big as the lawyer and the engineer—two fellow professions which have had, as professions, a good deal to say about running utility commissions during the first three decades of their development.

This generality was made abundantly clear in a recent address before the Eastern Four-states Accounting Conference at Atlantic City, N. J. The address was made by a noted public accountant, D. M. Livingston, who until a few months ago served as a member of the Pennsylvania Public Utility Commission. Mr. Livingston began by outlining the accounting supervision exercised by the Federal commissions—the ICC, the FCC, the FPC, and the SEC. In the last-named case, of course, the accounting requirements have been confined to utility holding companies and their mutual service and subsidiary service companies.

And, in addition to these, as most readers of these pages well know, the greater majority of state regulatory commissions exercise general accounting jurisdiction over utilities subject to their control. After outlining this background Mr. Livingston proceeded to a consideration of problems arising in specific classes of utility accounts. He began with a note of caution about the relationship of accounting practices with respect to reports submitted to Federal and state commissions and tax authorities. Thus, he said, a report which may be prepared for the SEC may contain or omit material which will affect a report prepared for some other regulatory body.

The first classification of accounts reviewed by Mr. Livingston was "revenues." Here it is important to bear in mind that utility rates, which produce revenues, must be designed upon a nondiscriminatory basis. This legal requirement must be reconciled with the desire of the growing electric industry for promoting sales and making an equitable charge—in the case of its large commercial consumers, at least—for readiness to serve in addition to a charge based upon actual consumption.

Simplification of the utility rate structure, under such circumstances, was pointed out by the speaker as leading to difficulties which must be weighed by the accountant. He referred to an interesting experiment now being tried out by one electric company in Pennsylvania, whereby a single rate was made applicable to every consumer in the territory. This was possible only because the company was relatively small, serving some 1,500 customers.

MR. Livingston observed that the difficulty of simplifying rates can be traced to the fact that most of the large electric utility systems were formed through merger or consolidation of smaller units. One large electric system in Pennsylvania, serving a compact and relatively small area, was formed by the acquisition of almost 400 small companies—each of which brought into the system its own rate structure. Another large Pennsylvania electric utility had, until 1938, 107 different tariffs on file. Mr. Livingston stated:

> Simplification of rate structure in such cases has usually been avoided because of the reluctance of utilities and regulatory bodies to increase certain rates while decreasing others, in order to eliminate discrimination. Any increase in rates is always followed by strenuous objection. The accounting problem involved in such simplification processes arises in the calculation of revenues, under the new rates. Such calculations must be based on actual consumer consumption data.

Of course, any anticipated change in utility rates, either by voluntary action or regulatory order, is likely to affect



The Hartford Daily Courant

THE POWER IS THE THING

revenue and this becomes particularly important to the accountant when a security issue is contemplated and a ratio of earnings to interest requirements must be determined.

The second classification analyzed was the item of "expenses." This differs in the case of public utilities as compared with other commercial or industrial establishments because anything which constitutes a return on capital, such as interest paid, rents for leased roads, and similar items, is excluded from operating expenses. After generalizing that regulatory commissions usually allow as operating expenses of a utility all of the ordinary and necessary costs of conducting operations, including a reasonable allowance for depreciation and so forth, Mr. Livingston suggested that the ac-

countant, engaged in his first examination of a public utility's books, would be well advised to run over some of the recent decisions of the state regulatory bodies in rate cases touching upon such items as rate base, operating expenses, and rate structure.

He warned that difficulty would be most likely to occur where system expenses of a holding company for management, legal, accounting, tax, and engineering services have been allocated to various operating units. Unless such allocation was made on the basis of cost to the parent company, it is always subject to attack by the state regulatory body.

MR. Livingston then reviewed the conflict which results from a utility which desires to save income tax by running up depreciation charges, as against its desire to increase property valuation in a rate case by minimizing the amount of accrued depreciation. The courts have attempted to solve this problem by the general requirement that the determination of utility depreciation should be based upon observation of competent engineers. But here again difficulties of accountancy bob up. The speaker stated:

> The adoption of an undepreciated rate base and the use of the true sinking-fund method of depreciation has been considered as a solution. This provides for an annual allowance for depreciation, based on the estimated life of each class of property, which when invested at a fixed rate, will return at the expiration of the life of the property the amount which it cost. This method necessitates actual segregation of funds credited to a depreciation reserve, and the investment of such funds in income-producing property, either the property of the company itself or securities of other character. The adoption of this method of depreciation by a state commission in the case of a telephone utility would bring the company into immediate conflict with the Federal Communications Commission, which has adopted the straight-line method of depreciation. This is the only Federal commission, by the way, which has adopted any particular method of depreciation.
>
> Tentative discussions with representatives of telephone utilities, the Federal Communications Commission, and representatives of state commissions, indicate that the retirements of property in the early years of use under the sinking-fund method may be heavy, and if charged to the reserve on a 100 per cent basis, the fund might be bankrupt before it had any real chance to earn a return. The excess retirements over the amount provided in the reserve would have to be charged to operations of the current year, to make the method workable.

The speaker also touched upon the peculiar problem of estimating depletion with respect to natural gas companies. He said that it is a problem which requires "skilled, experienced engineering collaboration with the accountants." In the case of companies which are unable to determine the proper amount to be charged off for depletion, the Internal Revenue Bureau has in the past (in the absence of a property valuation) permitted 27½ per cent of gross revenues and not more than 50 per cent of net revenues to be written off for that item.

THE third and most difficult classification touched upon by the speaker was that of "fixed property." Books of most utilities contain in their fixed property accounts amounts which may be (1) actual cost in cash or securities, (2) appraised value, or (3) arbitrary write-ups. Actual cost to the utility may further be distinguished from the original cost of the property when first put into public service, and even original cost as of that time is often inaccurately stated on the books. Mr. Livingston said on this point:

> Prior to passage of Federal revenue acts providing for taxes on income, the old practice of most companies was to write their fixed property down to one dollar as rapidly as possible and to charge to operating expense every item which could possibly be so charged. This means that the property accounts more than twenty-five years old, and in some cases more than ten years old, generally do not reflect such elements of cost as interest during construction, cost of financing, engineering, superintendence, and the amount by which the property failed to earn a fair return during the promotional years.
>
> Until 1913, utilities in Pennsylvania operated just as any other business, with the privilege of making as much money as their ability, judgment, and foresight would permit. In 1913, the Pennsylvania Public Service Company Law was passed,

effective January 1, 1914. There wasn't much effective regulation in the early years. The commission had to formulate policy and wait for the courts to build up sufficient case law to support the statute.

Referring to the requirement first laid down in Smyth *v.* Ames that reproduction cost should be given some consideration in determining the utility rate base, the speaker admitted that it was a little difficult for an accountant "to depart from the books" and "attempt a theory which results in a valuation having no relation whatsoever to the original cost of the property." However, the attempts of Federal and state regulatory bodies to exclude subsequent valuation as a factor in rate making has resulted in legal confusion and "uncertainty on the part of utilities, which is not good for the business." Mr. Livingston makes an interesting observation on this point:

> From my experience, I should say that the utilities generally feel they have been playing one game for years and the utilities having won fairly consistently, the state regulatory commissions now propose a different game. This is all right with the utilities, if they know what the game is going to be, and if a fair consideration is given to the past. Any one of them, I think, would adopt original cost as a rate base from today on, if it could be given some assurance that it would be permitted to earn, on property honestly and prudently acquired *in the past*, an amount sufficient to meet reasonable interest and dividend requirements on securities issued *in the past*.

GENERALLY speaking, the accountant is inclined to associate cost with value and it was the speaker's thought that original cost should at least be reflected on the books and "adopted as a basis for rates for the issuance of securities *for the future*" conduct of a utility.

Mr. Livingston suggested also that where utility properties were acquired prudently and at apparently fair values, such should be allowed. He stated:

> You may recall that the California commission and the Pennsylvania commission were strenuously advocating in the highest courts of the land the use of original cost in rate cases. They were joined to some extent in this by President Roosevelt's proposal of the adoption of the prudent investment theory, which theory was presented to the courts in briefs and arguments by the Attorney General and Solicitor General of the United States. While these theories were being advanced, the Federal government, through its instrumentality, the Tennessee Valley Authority, concluded negotiations with the Commonwealth & Southern Corporation for the acquisition of its properties in the TVA territory. The price included allowances for going concern value and other intangibles, to which strenuous objections had been made in the past. To my mind, the TVA deal with the Commonwealth & Southern was a practical business approach, such as might be made by any business man to an extremely knotty problem. Some such approach *as to past history* must be made in the case of almost every utility under regulation, if there is to be peace and understanding, fairness both to the public and to the utilities, in the relations of utilities with Federal and state commissions.

The speaker added that he had found only a few utilities and only a few commissions so obstinate and contrary in their methods that resource to the courts was unavoidable. He said that the majority of the state and Federal regulatory commissions and the majority of utility executives are fair and reasonable men with the ability to reach a fair and honest agreement if given the opportunity.

CORRECTION: NEW YORK FAIR UTILITY EXHIBIT

IN the June 22nd issue of PUBLIC UTILITIES FORTNIGHTLY *(page 851) was a description of an interesting utility exhibit at the New York World's Fair, in which the "Street of Yesterday" was contrasted with the beautifully illuminated "Avenue of Tomorrow." It was inaccurately stated, however, that this exhibit was sponsored by the Niagara Hudson Power Company. As a matter of fact, this was one of the exhibits "sponsored through the Electric Utilities Exhibit Corporation and made possible by some 150 electric light and power companies east of the Rockies," according to a more ample description by Clayton Irwin, managing director of that corporation, which was published in a previous issue of the* FORTNIGHTLY *(June 8, 1939, page 707).*

The March of Events



Effect of House Amendment on TVA Purchase

In answer to numerous inquiries about the effect of the House amendment on the contract between The Commonwealth & Southern Corporation and the Tennessee Valley Authority and associated municipalities, Wendell L. Willkie, president of Commonwealth & Southern, recently stated:

"The contract for the purchase of the Tennessee Electric Power Company by the TVA can be completely carried out under the provisions of either the House or the Senate bill. There are no provisions in the House bill which conflict with the provisions of the contract.

"All that is necessary to carry out the present contract is an authorization of $45,000,000. The House authorized $61,500,000. The House also decided to limit the TVA's future purchase of utilities, authorized the state of Tennessee to tax the beneficiaries of public power, and limited TVA's future operations to the Tennessee valley. None of these affects the consummation of the present contract.

"The passage of the bill yesterday (June 14th) should expedite instead of retard the carrying out of the contract. Obviously, the adoption of the House bill, particularly its provision confining TVA's operation to the Tennessee valley, would constitute a great reassurance to utility investors.

"When it became apparent a few weeks ago that some of the municipalities, parties to the contract, would not have adequate time between the date of the passage of the bill by Congress and the closing date of the contract in which to arrange for their financing, I gave assurance to such municipalities that we would, on a pro rata allocation of taxes, extend the contract for any reasonable period of time.

"The bond deposit agreement for the Tennessee Electric Power Company first and refunding bonds is effective until November 1st. I see no reason why the contract will not be completed. I have little doubt that a bill will be worked out in conference which will be adopted by both the Senate and the House."

SEC Changes

The Securities and Exchange Commission recently announced the appointment of Joseph L. Weiner as director of its public utilities division to succeed C. Roy Smith. The commission also announced the appointment of Robert H. O'Brien as associate director of the division to succeed Abe Fortas. Roger S. Foster was appointed counsel to the division. George Spencer, assistant director of the division, will continue in that capacity. The position of assistant to the director was abolished.

Mr. Weiner has been on the staff of the commission since September, 1938, as special counsel to the reorganization division. He was appointed assistant corporation counsel of New York city in charge of all public utilities on January 1, 1934. In this capacity he was in charge of all rate cases, contracts, and negotiations for the city. In 1937 he was appointed counsel for the board of transportation of New York city and until his appointment to the SEC last fall was in charge of all legal work of that board.

Mr. O'Brien has been assistant general counsel of the commission since August, 1938. For the year previous to that time he was assistant director of the commission's registration division.

Mr. Foster has been on the commission's staff since the fall of 1935 during all of which time he has been closely associated with the legal problems arising under the Holding Company Act.

FPC Issues Utility Data

A comprehensive report of statistics of 385 privately owned electric utility companies, representing, on the basis of assets, 90 per cent of the industry in the country, has been prepared by the Federal Power Commission from the data of reports furnished it by Class A and Class B utilities, or those receiving annual electric revenues of $250,000 or more.

The report was issued in two volumes, making available for the first time uniform and detailed statements of revenue, operating expenses, and classification of plant.

The total assets of the reporting companies were estimated at $16,873,384,102. The aggregate of the utility plant accounts of the companies was $13,851,583,019. This figure represented a book investment in utility property of about $5.50 to the dollar of annual revenue. Utility plant constitued 82.1 per cent of total assets. Combined total of current assets amounted to $959,074,918, only slightly less

than $1,000,000,000 and was 1.4 times current liabilities of $692,383,959.

Outstanding securities of the companies aggregate $13,378,579,835, including $4,306,363,835 common capital stock, $2,125,431,564 preferred stock, and $6,850,194,447 long-term debt.

Common stock represented 32.2 per cent of the amount of outstanding securities; preferred stock 15.9 per cent; premiums, assessments, etc., 0.7 per cent; and long-term debt 51.2 per cent. The combined surplus accounts of the companies aggregated $1,026,278,938.

The volumes contain approximately 250 pages each, and are sold only by the commission at $2 a set. Volumes are not sold separately. No copies are available for free distribution.

Hopkins Seeks Funds

SECRETARY of Commerce Hopkins told the Senate Appropriations Committee, in urging an appropriation to build his department's staff to help business, that the government's relationship to private utilities "is an important problem, extremely important, one of the most important in America."

The industry, Mr. Hopkins said, wants to talk to the Commerce Department as an instrument of government interested in the promotion of industry and business and to explore the whole business of what should be the policies of the government and private utilities.

The Commerce Department head told the Senate group that this was just one of the things that would come up in the Commerce Department under the new program that he was seeking as a means of aid to business and industry. The Secretary said:

"I realize fully all the responsibility that goes with such discussions. I realize fully that it is none of our business to get into, and act as a go-between, let us say for the Department of Justice or the Securities and Exchange Commission and a group of people who are dealing directly with them."

SEC Changes Rules

THE Securities and Exchange Commission last month announced two changes under sections of the Public Utility Holding Company Act.

First, the SEC repealed the exemption in the case of servicing foreign companies and adopted a rule providing for application for exemption from the act in regard to the servicing of foreign associates. The new rule provides an exemption pending SEC action on the application, providing the company files an undertaking to segregate and retain all profits earned during that time and, in the event of the complete or partial denial of the application, to make a fair distribution to the serviced companies of those segregated profits.

The rule also grants a blanket exemption from the standards of the act for the performance of service, sales, or construction contracts with foreign associates so long as the total cost to all such associates does not exceed $10,000 within one calendar year, whether performed by one or more subsidiary companies or mutual service companies in the holding company system.

The SEC also altered its rule regarding exemptions for banks holding in excess of 10 per cent of holding company securities. The revised rule calls for semiannual statements instead of quarterly reports previously required; provides that pledged securities (other than those pledged for defaulted loans and certain other types of loans) and custodian securities need not be reported unless such securities are voted by the bank or the bank has exercised control over their voting rights. In the event that pledged securities or custodian securities are voted, or voting control with respect to them is exercised by the bank, the name of the issuer of such securities must be reported as well as certain additional information.

FPC Appointment

LELAND Olds, who served for many years as executive secretary of the New York State Power Authority, was appointed to the Federal Power Commission last month by President Roosevelt. The term of office for which he was designated is for five years, ending June 22, 1944.

Considerable surprise was attached to the nomination since Mr. Olds will supplant Frank R. McNinch on the Federal power agency. On October 1, 1937, Mr. McNinch, who was serving as chairman of the Federal Power Commission, was transferred on a "temporary basis" to the Federal Communications Commission to head that agency, which was under heavy criticism by Congress.

Mr. Olds' service on the power authority in New York state had brought him into close contact with President Roosevelt while he was governor. The Senate confirmed Mr. Olds.

Alabama

TVA Act Opinion Declined

THE state supreme court recently declined to answer questions presented by Governor Dixon on the constitutionality of the act of the 1935 state legislature removing TVA operations from the jurisdiction of the state public service commission. In reply to Dixon's

request for an advisory opinion, Chief Justice John C. Anderson wrote:

"I beg leave to report that the justices are of the opinion that as the act (Walker) to which you refer has been adopted for over four years, and the questions asked involve many important legal points, upon which legal rights may have accrued, we do not feel disposed to answer the inquiry without having the benefit of argument and briefs in a controverted issue in a regular judicial proceeding."

Dixon asked if the Walker Act:

(1) Violates the Constitution of Alabama, which requires that each law shall contain but one subject; (2) "is the attempt of the legislature to declare what is a nonutility an interference with the powers of the judiciary to determine whether or not any functionary is subject to state regulation as such"; (3) is the act violative of the Constitution of Alabama and the due process clause of the Fourteenth Amendment to the United States Constitution "in arbitrarily exempting one class of activities from regulation by an agency of the state, and requiring other like activities to be regulated by such agency; (4) is the act violative of the Alabama Constitution "in that the legislature fails thereby to provide for the regulation of a class of activities which it declares to be 'nonutilities'"; (5) is the act unconstitutional "in that the legislature fails thereby to prevent such activities denominated 'nonutilities' from increasing unreasonably the cost of electricity to the public, or to prevent reasonable competition in such business?"

Arkansas

Collect Sales Tax

THE sales tax is an excise or privilege tax, rather than property tax, and as such it must be collected and paid on the sale and distribution of electric power by a municipal light plant, the same as on the sale and distribution of electric power by any other electric plant, State Attorney General Jack Holt held recently.

The opinion, prepared by Assistant Attorney General Millard Alford, went to state Senator Jeff Bratton of Paragould. Mr. Alford cited supreme court decisions to bear out his conclusions.

Mr. Holt advised Mayor M. E. Bird, of Earle, that Act 53 of 1939 which provides that the state, counties, and cities cannot issue warrants in payment of claims until the claimants show they have paid their state, county, and city taxes, does not apply to nonresident salesmen or companies, or to persons who have not had to assess property for taxes.

Plant Hearing Called

HARRISON'S city council advanced its plan to acquire the light and power plant of the Arkansas Power & Light Company recently by calling a public hearing on the question for July 10th.

John H. Allen, representing J. T. Raney & Sons, of Little Rock, outlined the procedure to be followed. The city has a contract with Raney & Sons guaranteeing a price of 105 for municipal 5 per cent bonds if the purchase agreement is consummated. Mr. Allen recommended employment of A. H. Johnson, civil engineer, to make an appraisal of Arkansas Power & Light Company property.

California

Power Studies

ORGANIZATION of a special staff to make "studies" in connection with the state's part in the publicly owned power project of the Central valley water program was recently reported under way in the state department of public works. Examinations have been held or would be held for various positions in the set-up which the Olson administration was preparing, it was said.

Ernest A. Rolison, former San Mateo county manager, holds a $420-a-month job as supervisor of electric utilities. Louis Bartlett, a one-time Socialist mayor of Berkeley, was listed on the payroll at $500 monthly as "legal and economic counsel." The two have been active in municipal ownership promotion.

Congress Asked to Revive Raker Act

CONGRESS was asked by the San Francisco Board of Supervisors on June 12th to amend the Raker Act so that San Francisco may legally dispose of its Hetch Hetchy electric energy.

Six of eight board members present accepted the results of the May 19th bond election as a mandate of the people against municipal distribution. Acceptance by Congress of the city's formal request would halt present Federal court litigation that threatens $2,-

200,000 a year revenue from an agency's distribution agreement with the Pacific Gas and Electric Company.

The city, in a recent brief filed with the circuit court of appeals, contended that Theodore Roosevelt, when President, was the author of language in the Raker Act that for fourteen years has been a disturbing factor in local politics, caused numerous power bond issues to be proposed to the people, and brought the Federal government and San Francisco into court as foes.

Louisiana

Rate Cut Announced

ANOTHER reduction in electric rates for the domestic consumers of New Orleans was announced last month by Mayor Robert S. Maestri. The new cut, Mayor Maestri said, brought the domestic rate down from 4½ cents per kilowatt hour to 4 cents per kilowatt hour, effective on bills rendered from July 1st.

The previous decrease in rates went into effect in August, 1938, when the cost per kilowatt hour to domestic consumers was lowered from 6½ cents per kilowatt hour to 4½ cents. The new reduction, effected following conferences with A. B. Paterson, president of New Orleans Public Service, Inc., will mean a saving of $225,000 annually to domestic consumers, the mayor explained. The reduction last August represented a saving of over $500,000 to domestic users of electricity.

Missouri

Asked to Drop Hand-set Charge

ELIMINATION of the extra charge of 15 cents a month for so-called hand-set or French-type telephones, now collected for the first twelve months after such instruments are installed, was provided in a new tariff schedule recently filed by the Southwestern Bell Telephone Company with the state public service commission, effective July 1st.

Removal of the charge would apply to all exchanges of the Southwestern Bell in Missouri. It was estimated that about $290,000 hand-set telephones were in use by Southwestern Bell customers in Missouri, but, due to the 12-month limit for the charge, the extra rate actually was being collected for about 58,000, it was said.

Removal of the 15-cent monthly charge would amount to about $95,000 a year, it was said, based on the present number of telephones.

Seeks to Block Hearing

THE city of St. Louis recently asked the state public service commission to overrule the application of the Laclede Gas Light Company for reopening of the 1934 rate and valuation case for further hearing in connection with the company's proposed "promotional" rate schedule.

Purpose of the city in filing the petition was to oppose the Laclede Company's claim to the $1,400,000 impounded gas rate fund. The fund represents the difference between amounts the company has continued to collect under old rates and amounts it would have collected had the 6 per cent cut ordered by the commission in 1934 gone into effect.

No objection was made by the city to the proposed "promotional" rate schedule filed by Laclede with its application for reopening of the 1934 case. The proposed rates would result in an estimated average saving of 7 per cent to consumers. The company had asked for consolidation of the rate schedule with the 1934 case for an early hearing of the consolidated proceeding.

In asserting claim to the fund, the company said it was willing to consider disposition of the money by agreement rather than on the "basis of strict legal rights." The city insists on payment of the full amount to consumers.

New REA Co-op Law

SUGGESTING that the "unseen hand of private utilities is behind the refusal to permit Democratic action," John M. Carmody, head of the Rural Electrification Administration, last month appealed to Governor Stark to use his influence to get out of a Missouri legislative committee a measure guaranteeing the right of farm groups to operate as coöperative distributors of electricity.

The bill in question, Carmody said, was being bottled up in the senate committee on agriculture through the refusal of Chairman Charles Roberson to permit action on it. But on June 22nd, the Senate passed the bill 3320. Senator Jones, the bill's sponsor, criticized REA interference in the matter.

Carmody early last month attended a regional meeting in Kansas City at which, he said, farmers who already have obtained REA funds to build coöperative distribution lines urged immediate action on the bill. The act would give the coöperative agencies an unequivocal right to operate in the state. At

present the coöperatives are functioning under an antiquated statute that leaves some doubt as to their status, it was said.

As finally passed by both houses of the Legislature, the new REA bill permits Co-op organization in rural areas and towns of less than 1500. Co-ops are prohibited from soliciting customers of private utilities. The state public service commission is specifically denied any jurisdiction over the rates or service or financing of the co-ops, but does have power over the safety of construction.

Nebraska

Offer to Buy from District

NEBRASKA Power Company and Loup River Public Power District officials conferred at Columbus last month on the offer of the private power company to purchase approximately half the annual output of the Loup district. Faye C. Smith, assistant general manager of the power company, and I. H. McNeil, superintendent of distribution, presented an informal offer to the district officials.

Smith said the tentative plan included purchase of 120,000,000 kilowatt hours per year from the Loup district. The power company would buy the first 40,000,000 kilowatts at 3.2 mills, the next 40,000,000 at 2 mills, Smith explained. He estimated the purchase would bring the district about $500,000 a year in revenue. Also included in the plan was the purchase of 13,000 kilowatt hours daily at Fremont at 4.2 mills.

Previous offers to the district contemplated purchase of only 80,000,000 kilowatt hours per year.

New York

Bonbright Elected Chairman

AT a regular meeting of the Power Authority of the State of New York last month, the trustees elected Dr. James C. Bonbright, professor of finance at Columbia University, chairman to succeed the late Frank P. Walsh.

The trustees also elected Fred J. Freestone of Interlaken, N. Y., vice chairman. Mr. Freestone has been a trustee of the Power Authority since 1931. Mr. Bonbright has been a trustee of the Power Authority since its creation in 1931 and had been its vice chairman since 1934.

The trustees considered plans for the new fiscal year to assure the early undertaking of the St. Lawrence power project and the marketing of the power in coördination with the other power supply of the state along the lines of the plan proposed in the Power Authority's eighth annual report submitted in May to the governor and the state legislature.

Ohio

Ruling Brings Delay

THE city of Columbus lost a round last month in its long-drawn battle to stop the Columbus & Southern Ohio Electric Company's attempt to block the $1,030,000 extension of the municipal light plant in the district court of appeals.

In a 2-to-1 decision, with Judge Frank Geiger writing the majority opinion, the court overruled the city's demurrer to the suit brought by the private utility to prevent the city from making the municipal light plant improvement voted by the people. The city could either appeal to the state supreme court from the appeals tribunal's ruling on the demurrer, or it could go back to the common pleas court to take the case up on its merits, as instructed in the decision.

In the 33-page decision, which reversed an earlier ruling by Judge Charles A. Leach in the common pleas court, the court held to the theme that "people have been constantly endeavoring to protect the taxpayer against the tax spender." The court pointed out that in 1933 when the voters approved an $800,000 bond issue for the light plant addition, it required only a majority vote for approval. At the present time, the court explained, a 65 per cent majority is necessary for approval. The decision stated:

"In our judgment the legislature has not the power to extend the provisions as to limitation when the money necessary to pay those bonds would impose upon the taxpayers a greater burden than is permitted by the Constitution."

The court did not rule on the question of whether the city had exceeded its bonded indebtedness or had misrepresented its bonded debt. Judge Geiger pointed out in the decision that the city had admitted that it had exceeded

its bonded indebtedness but that it was legal because of an amendment approved by the legislature in 1937.

City officials, however, were wondering whether the recently enacted state law would prohibit the city from going ahead with the proposed extension. City Attorney John L. Davies said he did not believe the so-called "sleeper" would affect the extension of the municipal plant. Governor Bricker was said to be of the same opinion.

Gas Fund Hearings Postponed

To give attorneys for the Ohio Fuel Gas Company time in which to prepare a rebuttal, Special Master Gail H. Butt recently ordered an indefinite postponement in the Federal court hearing of litigation involving the question of distribution of nearly $2,000,000 in impounded gas funds.

Prior to the adjournment, the city rested presentation of its facts, J. Paul Blundon, expert utility engineer, being on the stand briefly for cross-examination by company counsel.

No indication was given as to how extensive the gas company's rebuttal would be. After it is presented, both sides will submit briefs, indications being that this would require from thirty to sixty days. Special Master Butt will then begin an intensive study of the evidence, it was said.

The case was said to center around operating experiences of the old Federal and Columbus Gas & Fuel companies. Mr. Butt will decide whether a rate collected by the companies was a fair return outside of the impounded funds. If he decides in favor of the city, the impounded money will be distributed to Columbus consumers. However, it was believed the case would be carried to the supreme court for final adjudication.

Oklahoma

Phone Rate Increase Urged

A REPORT by Frank M. Bailey of Chickasha, special master in a suit of the Southwestern Bell Telephone Company against the state corporation commission, recently disclosed statistics purporting to support his recommendation to Federal district court that the utility be permitted to increase its rates in 14 state cities.

Bailey, who has been hearing and passing on complicated evidence and testimony in the case since December 19, 1938, reported that rates in force in Ada, Ardmore, Blackwell, Chickasha, El Reno, Guthrie, Lawton, McAlester, Norman, Okmulgee, Ponca City, Sapulpa, Shawnee, and Stillwater, "are unreasonably low, confiscatory, and unlawful."

The utility filed the suit last year to prevent the state commission from halting proposed rate changes which would hike rates for residential and business use from a $4.50 monthly top to a $5.50 top. Under the changes, residential service would cost from $1.85 to $2.75 a month, instead of the present $1.50 to $2.50, and business service would cost from $4.50 to $5.50 instead of $3.50 to $4.50.

The proposed schedule would also install "measured rate" telephones for business use, each allowed 80 calls a month at $4, in Ardmore, Lawton, Norman, Okmulgee, Ponca City, Shawnee, and Stillwater.

Accepting the company's estimated book value of $52,986,638 and its reproduction value of $50,424,318, Bailey found that 10 per cent reduction for depreciation gave a value of $45,382,013, which when added to $935,000 in required working capital gave the system a net value of $46,317,013.

Answering the state commission's contention that action in the injunction suit should be delayed pending completion of a statewide inventory of the telephone firm's properties, Bailey said the utility was "entitled to relief as soon as proper consideration may be given." The commission is currently engaged in a statewide investigation begun April 4, 1938.

Oregon

Phone Settlement Approved

SETTLEMENT of the 12-year-old controversy with the telephone company and dismissal of the case pending in the Federal court was tentatively approved by the Portland city council recently by a vote of 3 to 2.

The settlement was recommended by City Attorney Lyman E. Latourette after Federal Judge James Alger Fee notified both sides that the case would go to trial June 26th or be thrown out of court.

While the settlement was the outgrowth of negotiations between attorneys for the city and the company, it would have to be approved by the company before it could be carried out. The council also would have to grant formal authority for dismissal of the suit.

Under the proposed agreement, the company would cancel the city's unpaid bill of about $370,000, while the city would dismiss its claim for 5 per cent of the gross revenues of the company for the past several years. The city has been getting 2 per cent in the meantime. At the same time the company would furnish the city 300 main line telephones and other facilities now provided.

The city also agreed, under the proposal, to grant a permit for the company to operate for the next five and a half years.

Pennsylvania

Gas Rental Deal Agreed

THE city of Philadelphia, the Reconstruction Finance Corporation, and local banking and financial interests last month reached a tentative agreement on a plan for "sale" of the $4,200,000 annual gas works rentals.

The plan would provide that the city receive $41,000,000 in cash, to be used in paying off the accumulated deficit and wiping out some of the mandamus arrears, in return for assignment of the rentals for something less than thirteen years, at an interest rate of 3½ per cent a year.

One of the gravest obstacles to the agreement was removed when the local interests accepted the RFC proposal for division of the trust certificates which would be issued to the participants by a trustee.

Other details of the plan would provide that the purchasers assign the gas revenues to an assignee who in turn would transfer them to a trust company which would issue trust certificates indicating the interest of each party to the transaction and its share of the rentals. The certificates would be issued at 100 plus accrued interest, and would mature semiannually over an 18-year period beginning this November 1st, and ending May 1, 1957.

Out of the $4,200,000 in rentals which the trustee would receive from the city each year, only approximately $3,200,000 would be returned to the purchasers in the form of interest and maturity payments. The remaining $1,000,000 each year would be put into a reserve fund to provide for continued payments should there be some unforeseen stoppage in the gas works income.

The state public utility commission recently dropped its cases involving the Philadelphia Gas Works Company, which the legislature removed from the commission's jurisdiction. Among the commission's pending business with the gas company was its order of September 27, 1938, fixing a temporary maximum charge of 85 cents per thousand cubic feet for gas.

Tennessee

For Union City Plants

AN organizer for the American Federation of Labor called upon the Tennessee labor convention last month for a militant stand that would force municipal power boards to deal with its unions. The organizer, Paul Aymon of Chattanooga, warned the convention it must take immediate action or "these power boards are going to operate on the same basis as the power companies—anti-union."

Labor leaders saw in the TVA-municipal acquisition of Tennessee Electric Power Company an opportunity to organize the workers on a larger scale than was accomplished under its private ownership. The company never recognized a union as a bargaining agency, it was said.

Aymon, a former president of the Tennessee Federation, said "it is time and high time we get out and see that they (power boards) sign up with the trades involved." Aymon criticized the creative set-up for municipal power boards, stating that in most cases they were self-perpetuating through members filling vacancies when terms expire. "These power boards should be subject to the vote of the people," he asserted.

Texas

Bond Proposals Rejected

IN a warmly contested election, citizens of Kenedy recently turned down, by a vote of 225 to 217, a proposal to float $100,000 in revenue bonds to build a municipal electric system to distribute Lower Colorado River Authority power. Voters of La Grange and Eagle Lake also recently rejected similar proposals, preferring to rely on the facilities of privately owned systems.

Kenedy and surrounding towns are now served by the electric network of Central Power & Light Company.

Another victory for private ownership of the electric light and power industry was subsequently scored when voters of Temple defeated a proposal to sell $850,000 of bonds for construction of a municipal power system. Although the city has a population of only 16,000, the outcome of the election was regarded as important by utility circles, it was said, because Temple is only about 90 miles north of the area being taken over by the LCRA. The city is served by Texas Power & Light Company.

Washington

Sets New Policy

THE new policy of the Bonneville administration toward public utility districts was one of sympathy, but not of action, Frank Banks, acting administrator, told delegates from Washington's 25 public utility districts in the annual meeting of their association at Vancouver last month. In his first direct public declaration of policy, Banks declared:

"We are in sympathy with you, but we are not going to fight your battles. We won't take the position of campaigning for formation of districts. We won't take sides between districts and private utilities. The Bonneville administration is a Federal enterprise and will give assistance and information equally to all."

Banks further revealed that his staff was working on forms for contracts with public utility districts designed to be as uniform as possible.

Wisconsin

Assembly Kills Bill

THE municipal utility competition bill was killed, 58 to 34, in the state assembly on June 15th. Introduced by Assemblyman Otto Vogel, Progressive of Manitowoc, the measure would enable municipally owned utilities created by referendum to compete with private utilities without having to obtain a certificate of convenience and necessity from the state public service commission.

Since the people, through granting franchises, permit public utilities to serve them, they should have the power to take away the franchises and serve themselves through publicly owned utilities, Vogel contended. He cited rates of the electric utility owned by Manitowoc to show rate decreases from 12 cents a kilowatt hour in 1914 to 2½ cents in 1937.

The Republican-Democratic majority voted to kill the bill.

Court Denies Rehearing

THE state supreme court last month denied a motion for rehearing sought by the state public service commission in the Edgerton utility case. Under the statutes, the court said, it is the duty of the commission to fix just compensation for purchases of utility properties.

Edgerton formerly voted to take over the city utility owned by the Wisconsin Power & Light Company, and the court found that compensation was fixed by the commission as of the time of the vote rather than as of the time when the commission award was made. Such an order, the court said, was a failure to comply with the statutory command.

The state public service commission subsequently acted to have the Edgerton and other cases involving municipal acquisition of public utilities taken from the courts and returned to the jurisdiction of the commission, in accord with the state supreme court's ruling in the Edgerton Case.

Other cases pending with Edgerton were for acquisitions at Adams, Medford, Superior, Mount Horeb, Darlington, Pardeeville, and Cambridge. It was said the appeal in the Superior Case, however, did not involve the question of the date of value.

Wyoming

Ask Lower Rates

A FORMAL resolution calling upon the state public service commission to order a flat 50 per cent reduction in residential light rates in Casper had the unanimous approval last month of the Casper trades and labor assembly.

The Mountain States Power Company recently cut its light rates at Casper, Douglas, and Glenrock—an action designed to save Casper consumers an estimated $26,000 annually. The company also filed its intention to reduce its rates further when power is made available to it at lower cost from the Seminoe dam.

The Latest Utility Rulings



Industrial Company Held to Be Public Utility In Furnishing Service to Tenant-employees

A MINING corporation not authorized by its charter to engage in the furnishing of electric current to the public was held by the Pennsylvania commission to be engaged in public utility service to employees renting its houses. The company owns and maintains on a portion of its property a town of approximately 180 houses, substantially all of which are leased to its employees. The company for several years has furnished electric current through its own facilities to its tenants, through separate meters, without having secured a certificate of public convenience. The company at each pay period deducts the amount charged for the current from each tenant's pay, which deduction is shown on the employee's pay envelope.

The company intended to discontinue service, and notice of such discontinuance had been served on its tenants. The commission ordered continuance of service until such time as the commission should grant its approval for abandonment, and the company was required forthwith to comply with the provisions of the Public Utility Law.

The state public utility commission said concerning the interpretation of the statute defining "public utility":

> Under § 2, *supra,* in order to sustain the character of public service, the utility service need not be one which is offered to the public indiscriminately. The service furnished by the respondent is offered to all those members of the public who can use that particular service; that is, to all tenants of the respondent. In doing so the public is in fact served, and the business is affected with a public interest although the actual number of persons served is limited. Ambridge *v.* Public Service Commission, 108 Pa. Super. Ct. 298, P.U.R. 1933D, 298, 165 Atl. 47.
>
> Although the rendering of said service is *"ultra vires,"* nevertheless, it is subject to regulation by the commission. In determining whether a corporation is rendering service which is subject to regulation by the commission, the important thing is what it does, not what its charter says. Pennsylvania Chautauqua *v.* Public Service Commission, 105 Pa. Super. Ct. 160, P.U.R. 1932D, 145, 160 Atl. 225.

In view of the fact that the company had fully coöperated with the commission in having its status determined, and that there was a reasonable question as to whether or not the service was a public utility service, no penalties were imposed. *Pennsylvania Public Utility Commission v. Westmoreland Mining Co. (Complaint Docket No. 11657).*

Protest by Stockholder Fails to Prevent Bond Issue

A SECURITIES certificate in the matter of the issuance of first mortgage extension bonds by a sewerage company to finance an extension of facilities was authorized by the Pennsylvania commission, after approval of the financing proposal and rejection of a protest by a stockholder.

The bonds-to-property ratio was found to be approximately 40 per cent. The total - securities - to - property ratio was found to be approximately 67 per cent. The commission held that these ratios were satisfactory. Earnings for the past four years were sufficient to earn fixed charges on the bonds to be issued, ac-

cording to years, 3.07, 3.09, 3.46, and 2.02 times. This showing, based on past experience, was said to be satisfactory.

A protest was filed by the holder of one share of stock in the corporation on the ground that the bond issue had not been legally authorized. This stockholder had been bequeathed as a specific legacy one share of stock out of forty-four shares held by his father. Forty-two shares of stock had been bequeathed to the executor of the estate in trust. The executor had waived notice of the special stockholders' meeting to authorize the bond issue and had voted the forty-four shares of stock in favor of issuance of the bonds. The commission held that the protestant had failed to show that the authorization of the bond issue was invalid.

The utility's argument, accepted by the commission, was that under the law the estate of the decedent would not be settled within six months, and the stock of the estate was voted by the executor in favor of the increase of indebtedness within that time. In so doing the Pennsylvania statutes had been met. It was submitted that the fact that there was a bequest of only one share to the protestant did not under the authorities give him a right to vote such stock, at least in the absence of a protest by him at the stockholders' meeting. *Re Middletown Drainage Co. (Securities Certificate No. 54).*

Customers Allowed Option to Take Meter Rate Service

A COMPLAINT by a water consumer against the action of a public utility company in offering domestic service at flat rates only was sustained by the Pennsylvania commission. In any instance where a public utility reserves the right to elect that service to any consumer shall be on the meter rate basis, said the Pennsylvania commission, it is just and reasonable that the consumer have the corresponding right to elect meter rate service. Consequently, the commission ordered the company to give consumers the right to elect meter rate service. The commission made this statement:

> This commission has held on other occasions that meter rates for services are more equitable to both the company and the consumer than flat rates. Furthermore, meter rates result in conservation of water and in decreased pumping costs. We are not greatly impressed with respondent's evidence relating to the installation and operating costs of large numbers of meters, particularly since, as pointed out by respondent, it is probable that for some of the consumers who signed the petition and for many of the other domestic consumers, meter rate service would result in bills which would be higher than for flat rate service, and thus would not be chosen by such consumers.

Grove v. Red Lion Water Co. (Complaint Docket No. 12618).

Utility Required to Make Studies of Depreciation Rates and to Inventory Property

THE Utah commission, upon starting an investigation of rates of the Uintah Power & Light Company, ordered the company to make an accurate inventory of its properties. This was to be done in addition to and as an assistance in reclassifying its property pursuant to an order for reclassification on an original cost of construction basis in accordance with a new system of accounts. The commission desired information from which the fair value of the properties of the company could be obtained.

The company had been making substantial charges during recent years for depreciation expense but had not based its charges on detailed engineering estimates of the property lives or depreciа-

tion requirements of the property. During 1938 such depreciation charges were approximately 20 per cent of the company's gross revenues. The commission was of the opinion that because of the major importance of this expense item the company should make detailed engineering studies of its various classes of depreciable property to determine the depreciation rates that should be used to substantiate its depreciation charges.

A report submitted by the engineering department of the commission indicated that the company had excess generating capacity available in its plant and that an increased use of energy would not materially increase cost of generation. The commission was convinced that it would be in the interests of the public and would not impair the company's operations to order a reduction in certain of its rates and modification of some of its practices. This, it was believed, would result in increased consumption of energy.

The time for paying bills before incurring a penalty was extended to fifteen days, and the penalty was reduced to 5 per cent. *Re Uintah Power & Light Co. (Investigation Docket No. 18).*

Conditions under Which Water Service Should Be Extended

THE Pennsylvania commission held that it should not require a water company to extend service to a real estate subdivision if domestic consumption only were assumed, showing a deficit, based on all additional operating expenses, and a return on capital to be invested of 1.81 per cent based on out-of-pocket expenses. The company had indicated its willingness to extend service if a return of 3.41 per cent could be obtained.

The commission ordered that the company extend service if sufficient applications for domestic service and for fire protection service should be obtained so that a return of 2.68 per cent would be produced. The commission said that the difference between this return and the company's statement of reasonable return was one of minor degree only, particularly in view of prospective growth of the community to be served.

The commission was of the opinion that each extension must be reasonable when viewed in the light of the circumstances surrounding it, not only with respect to the needs and requirements of the prospective consumers, but also with respect to any added burden that might be placed upon the utility as a whole if such utility were ordered to extend its facilities.

A complaint that the supervisors of the township had failed to enter into a contract with the water company to secure this service was dismissed. The commission disclaimed jurisdiction to adjudicate differences between township supervisors and the inhabitants of a township as to a dereliction in their duties as supervisors. *Baughman et al. v. Westmoreland Water Co. et al. (Complaint Docket No. 12586).*

Ordinance Authorizing Bond Issue Referred to Voters

THE supreme court of Utah directed the issuance of a peremptory writ compelling city officials to refer to the voters an ordinance making certain changes in a former ordinance, approved by the voters at an election held pursuant to the state initiative and referendum statutes, authorizing the issuance of bonds to finance the construction of a municipal electric plant and system. The court ruled that the subsequent ordinance embodied legislative matter.

At the outset the court stated that the refusal by the city recorder to take the

initial step to set in motion the machinery provided by law to effect a reference raised the question as to whether the ordinance was within the purview of the initiative and referendum statute.

Under the statute providing that voters of any city may require any law or ordinance passed by the law-making body of such city to be submitted to a referendum before taking effect, the referendum is limited to the acts of the governing body performed in the execution of its function as a law-making body or to ordinances which are legislative in character, said the court.

The court adopted three previous decisions to test the nature of such an act. First of all, it said that the test for determining what is legislative and what is administrative is whether the ordinance is one making a new law, or one executing a law already existent. Secondly, it said that acts stating a public purpose and providing means of accomplishment call for the exercise of legislative power. The third guiding test it adopted states that actions which relate to subjects of a permanent or general character are deemed to be legislative while those which are temporary in operation and effect are not.

The court further said:

> It is apparent that here, where we are examining the original ordinance in juxtaposition to that enacted on August 5, 1938, to determine whether the changes made are legislative or administrative, the determinative test is the first. Does the later ordinance make a new law or execute one already in existence? The answer to the question should, we think, be sought by inquiring whether such changes may reasonably be viewed as clearly within the ambit of the voters' intention when the original ordinance was adopted by them.

The court concluded that where the voters had authorized the issuance of such bonds, a provision in a later act changing the financial plan so as to stretch over twenty years and eighteen annual payments of principal, instead of fifteen years with thirteen annual payments, was legislative in nature and subject to referendum. *Keigley et al. v. Bench, 89 P. (2d) 480.*

Commission Jurisdiction over Carrier Contracts with Governmental Agencies

THE supreme court of California, affirming an order of the commission, held that a contract between a truck owner and the department of public works, whereby the former was to furnish, at an hourly rate, trucks, drivers, and fuel, make necessary repairs, carry compensation insurance, and assume all liability for damage to other property or injury to persons caused by the operation of the equipment, constituted a contract for the transportation of property over the public highways within the meaning of the Highway Carriers' Act, and, therefore, subject to the jurisdiction of the commission, as against the contention that it constituted a renting of trucks within the meaning of the Streets and Highways Code.

In support of its opinion the court said:

> This conclusion follows from the fact that under the contract the possession and control of the trucks and the operators thereof did not pass to the department—the operators did not become the employees of the department—but such possession and control remained in Entremont [the truck owner]. The chief characteristic of a renting or a leasing is the giving up of possession to the hirer, so that the hirer and not the owner uses and controls the rented property. Civ. Code, §§ 1925, 1955. The record is clear that the only supervision exercised by the department over the operators of the trucks was to direct them where to load and unload the material hauled, when to go on or leave the job, and to inform the operators whether the load should be dumped or spread. The department had no power to discharge the drivers—that power, and the power of selection, rested in Entremont. That is a factor of some importance in ascertaining whether Entremont or the department controlled the operators.

The petitioner contended also that the

transportation was for the purpose of maintaining a public highway, and did not constitute transportation upon a public highway within the meaning of the Highway Carriers' Act. In response to this the court said that while the building of a highway by a governmental agency is not a commercial purpose, that doctrine has no application to the activities of a trucker who is employed to transport some of the materials to be used over the highways.

It was further stated by the court that the mere fact that a trucker was engaged in transportation for the state does not mean that the commission, in assuming jurisdiction over the operations of such carrier, was regulating a state agency.

In conclusion the court held that the Highway Carriers' Act, authorizing the commission to regulate rates of private highway carriers, is constitutional, as against the contention that such regulation is not cognate or germane to regulation of common carriers. *Entremont et al. v. Whitsell et al. 89 P. (2d) 392.*

No Separate Allowance for Going Value

THE Michigan Public Service Commission, in establishing new rate schedules at a telephone exchange where the company subject to the rate adjustment proposed intended to change to automatic dial type central office equipment in place of the present magneto type apparatus, said concerning its valuation basis:

> . . . the commission has made no separate allowance for going value for no facts to support the claim such as are required under the law were presented. Public Utilities Commission *v.* Michigan State Teleph. Co. (1924) 228 Mich. 658, P.U.R. 1925C, 158, 200 N.W. 749. Further, when the basis of valuation reflects the actual cost of attaching business such as advertising, promotion, training of personnel, etc., no separate allowance for going concern is necessary. California R. Commission *v.* Pacific Gas & E. Co. (1938) 302 U. S. 388, 82 L. ed. 319, 21 P.U.R.(N.S.) 480, 58 S. Ct. 334; Denver Union Stock Yard Co. *v.* United States (1938) 304 U. S. 470, 82 L. ed. 1469, 24 P.U.R.(N.S.) 155, 58 S. Ct. 990; Los Angeles Gas & E. Corp. *v.* California R. Commission, 289 U. S. 287, 77 L. ed. 1180, P.U.R. 1933C, 229, 53 S. Ct. 637.

Re Michigan Associated Telephone Co. (T-552-39.3).

Rights of Landowners upon Crossing Elimination

THE court of appeals of Maryland affirmed the decree of a lower court dismissing a bill seeking an injunction against the closing of a road over a railroad grade crossing, feeling that the elimination of such crossing did not wrongfully deprive the complainant of his convenient, lawful access to the main highway.

The complainant had been provided with a new outlet from his property crossing the railroad by bridge, but he alleged that such outlet was much farther away than the original crossing. The court answered this by holding that the mere increase of distance for travel in the one direction, the proceedings being proper, would not constitute a taking of the landowner's property for public use, and so require compensation to be paid for the taking.

It was stated that the meaning of the phrase "taken for public use" as used in the provision of the Constitution authorizing the taking of property for public use and requiring the payment of compensation therefor cannot be enlarged so as to include incidental damage or injury without making an appropriate constitutional amendment.

As to the contention that there was fraud and illegality in the proceedings by which the elimination of the crossing was placed at the command of the State Roads Commission, the court said:

> The complaint on this ground is that

Brehm's conveyance of the stretch of previously private roadway on his land, extending to the railroad right of way, was obtained by concealment of a purpose to remove the crossing at the site. It might be difficult, on the evidence, to adjudicate as a fact that it was so induced by deception. But if it were, conveyance of that part of the road did not bring about, or aid in, the removal of the crossing beyond it. It did not, so far as appears, aid in placing the crossing and the portion of the road beyond, to the Philadelphia road, under the control of the State Roads Commission. The removal could have been accomplished as well without acquisition of the road over Brehm's land as with it. He appears to have had at most an easement over the tracks and beyond, and even if the road over his land had continued in private ownership, the state, by its authorized agency, could have acquired the road over the tracks and beyond, and once owning it could have removed the crossing in the exercise of its police power. 2 Elliott, Railroads, 3d Ed. § 789; New York & N. E. R. Co. *v.* Bristol (1894) 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437; Costello *v.* Grand Trunk R. Co. (1900) 70 N. H. 403, 47 Atl. 265; Murphy *v.* State Roads Commission (1930) 159 Md. 7, 149 Atl. 566. Therefore, if there was fraud or deception, the complainant lost nothing by it.

Brehm v. Tabler et al. 5 A. (2d) 820.

Other Important Rulings

THE supreme court of Iowa held that a company engaged in the generation of electricity is a manufacturing corporation within the meaning of a statute authorizing coöperative associations to conduct a mercantile, manufacturing, mechanical, or mining business. *State ex rel. Winterfield v. Hardin County Rural Electric Coöperative et al. 285 N.W. 219.*

The commission of appeals of Texas held that a statute empowering municipalities incorporated under the general laws of the state to regulate the rates of gas companies, to fix penalties to enforce such regulation, etc., does not apply to home rule cities. *City of Sherman v. Municipal Gas Co. 127 S.W. (2d) 193.*

The appellate court of Indiana held that the commission can establish rules and regulations for the government of utilities in the prosecution of their business, but it cannot relieve them from liability under the law of negligence by any rule the commission may adopt. *Indianapolis Water Co. v. Schoenemann, 20 N.E. (2d) 671.*

The court of appeals of Georgia held that a carrier of passengers for hire, under a certificate issued by the commission, has no authority to employ an independent contractor, who has no certificate, to perform such a service, so as to escape liability for negligence or its liability to pay compensation to an injured employee. *Aetna Casualty & Surety Co. et al. v. Prather, 2 S.E. (2d) 115.*

The Colorado commission held that allowances made by motor carriers should be under the same conditions as those applicable to a competing rail carrier and should apply only to towns where the motor carrier has established depots of its own, the same as the rail carrier. *Re Freight Rates of Common and Private Motor Vehicle Carriers (Case No. 1585, Decision No. 13330).*

The California commission, in placing restrictions on operations of a highway common carrier, declared that it had not been the policy of the commission to grant a certificate to operate trucks in lieu of rail service without prescribing appropriate restrictions to prevent needless and unwarranted invasion of the revenues of highway common carriers maintaining service in the territory. *Re Pacific Motor Trucking Co. (Decision No. 31882, Application Nos. 18699, 18881, 19062, 19030, 19563, 20297).*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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NEW YORK DEPARTMENT OF PUBLIC SERVICE, STATE DIVISION, PUBLIC SERVICE COMMISSION

Re Brooklyn Edison Company, Incorporated, et al.

[Case Nos. 9760–9764.]

Rates, § 81 — Powers of Commission — Provisions in schedules — Reduction of liability — Optional rates.

1. The Commission, even in the absence of a statutory prohibition, has power to prevent utilities from inserting in their rate schedules a provision that the responsibility for the selection of an appropriate service classification is on the customer, p. 193.

Rates, § 254 — Optional schedules — Responsibility for selection.

2. A tariff provision that the responsibility for the selection of an appropriate service classification is on the customer should be canceled, p. 193.

[March 29, 1939.]

PROCEEDING *on motion of Commission as to tariff amendment intended to place upon customers the responsibility for selecting an appropriate service classification; rule and regulation suspended and utilities ordered to cancel regulation.*

APPEARANCES: Gay H. Brown, Counsel (by George E. McVay, Assistant Counsel), for the Public Service Commission; Randolph H. Nexsen, Chief Power Engineer, for the Public Service Commission; Whitman, Ransom, Coulson & Goetz (by Colley E. Williams), New York city, Attorneys for Brooklyn Edison Company, Inc., Consolidated Edison Company of New York, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, and The Yonkers Electric Light and Power Company; R. B. Grove, Vice President, Consolidated Edison Company of New York, Inc., New York city; F. M. Terry, Rate Engineer, Consolidated Edison Company of New York, Inc., New York city; J. J. McCoy, New York city, Consultant representing Utilities Consultants, Inc.; Charles Belous, Long Island City, Councilman, borough of Queens; E. F. W. Wildermuth, New York city; E. A. Carroll, President of Citizens Utility Association of New York, Inc., New York city; George A. Voss, New York city, Counsel for Medical Society of the County of Kings and Academy of Medicine of Brooklyn, Inc.; Arthur Harrison, Attorney for Bellaire Gardens Taxpayers Association, in opposition.

MALTBIE, Chairman:

[1, 2] Each of the companies named

has filed an amendment to its tariff reading as follows: "The responsibility for the selection of an appropriate service classification is on the customer."

This new rule was to become effective in each case upon February 1, 1939. Upon January 20, 1939, the Commission adopted an order in each of the cases named above reciting that the rights and interests of the public appeared to be injuriously affected by such a rule, directed that a hearing be held upon February 2, 1939, and suspending the new rule until May 15, 1939, unless otherwise ordered by the Commission.

When the hearing was called, counsel for the companies stated that notwithstanding the action of the Commission in Case No. 9439, 26 P.U.R. (N.S.) 373, his clients did not consider that the order issued in that proceeding applied to the matter now being considered, and that consequently the companies under the jurisdiction of the Commission were free to adopt some such rule and regulation as was filed and now suspended.

The fundamental principle laid down in that proceeding was that the Commission was decidedly opposed to any attempt upon the part of a utility to limit its liability or obligations under the statutes and court decisions through the insertion in its rate schedules of clauses which would limit or modify such liability. The general purpose of the proceeding and the orders issued was to make the position of the Commission clear and to direct the companies to eliminate from their schedules any provisions which could be used as a basis for a claim that the consumer by accepting service under such schedules voluntarily acquiesced and agreed to a limitation or modification of the liability of a public service corporation. It should have been clear to attorneys for the companies here involved that what they were trying to do by the insertion of the clause quoted above in their tariffs was contrary to the wishes of the Commission and its decision in Case No. 9439, *supra*.

Further, the Commission has repeatedly in its annual reports to the legislature called attention to the fact that many utilities have generally refused to accept any responsibility for seeing that a consumer obtains the lowest available rate or to guarantee that the consumer should have the most favorable rate to which he is entitled. The Commission has annually recommended for several years the enactment of a law which would make this principle effective so far as could reasonably be required. Governor Lehman, in his messages to the legislature, has taken the same position. In the last one dated January 4, 1939, he commented upon the situation as follows:

"Under the rate schedules of certain companies, there are different rates and varying requirements. The consumer is often puzzled and unable to decide what rate he should select to obtain service for the least money. He frequently chooses the wrong rate with the result that he pays more than other consumers similarly situated and similarly served. The utilities with their staffs of experts are in a far better position to determine what rates he should receive. At present, the companies insist that the responsibility is entirely upon the consumer and that if he selects the wrong rate, they

are in no way responsible. This condition should be remedied so as to require all public service corporations to give the consumer the proper rate."

But whether the companies had ample notice and should have been familiar with the position of the governor and of this Commission, the companies here involved did attempt to limit their liability. The proposed rule recognizes in no way whatsoever any obligation upon the part of the utility and they might just as well have said that "under no circumstances is a company liable in any way for the selection of a service classification and rate."

In view of the complicated rate schedules that are in operation in many companies, consumers are entitled to receive the help of the utility. It may be impossible in some cases for anyone having the best intentions to predict in advance just what form of contract or service classification would produce the lowest available rate for the service rendered; and if the company acted in good faith, rendered every possible assistance to the customer and did its best to properly advise him, it would, temporarily at least, be relieved of any responsibility in case the customer made a wrong selection. But to say that all responsibility for the selection of an appropriate service classification is on the customer and that the company is not responsible for a wrong classification regardless of what it says or does, is an extreme position and not justified by the statutes or present decisions of the courts.

That it is clearly the intent of the companies here involved to reduce their liability and impose all responsibility on the consumer is also indicated by the statements of counsel in the record in this proceeding. When asked whether the companies he represented were in favor of the legislation recommended by Governor Lehman to deal with this situation, he frankly stated that his clients were opposed to it. Thus far the legislation has not been enacted, but it is within the province of this Commission to prevent utilities from inserting in their rate schedules provisions which will reduce their liability under the guise of a contract said to be voluntary but which is practically compulsory, for a consumer cannot obtain service except according to company tariffs.

The record in these cases contains no testimony in support of the companies' proposed rule and regulation. It is devoted to general discussion and arguments. The position of the Commission has been made clear in other cases and there is no necessity for further repetition. The rule and regulation has been suspended and an order should now be adopted requiring the companies to cancel the regulation and to file amendments to their tariffs so providing.

Approved by the Commission, March 29, 1939; Commissioners Lunn and Burritt concurring; Commissioner Van Namee filing a memorandum dated March 21, 1939; Commissioner Brewster not present.

VAN NAMEE, Commissioner: I vote to cancel the proposed rule and regulation but not for the principal reason given in Chairman Maltbie's memorandum.

The question whether it is or is not desirable, reasonable, or just that the

company assume the responsibility of placing the consumer on the most appropriate service classification is not before us. As the law stands today, this responsibility is not on the company (Silver's Lunch Stores v. United Electric Light & P. Co. 142 Misc. 744, P.U.R.1932B, 458, 255 N. Y. Supp. 515). Several bills have been introduced in the legislature to place this burden on the company but none has ever passed.

I therefore see no objection to the present rule of law being stated in the rules and regulations. To my mind, such a statement is an added notice to the consumer of his rights and would tend to place him upon his guard in choosing the classification best fitted to his needs. But the rule as proposed is too broad a statement of the non-liability of the company; it makes no exception in cases where fraud, deceit, or gross negligence on the part of the company or its employees may be present.

SECURITIES AND EXCHANGE COMMISSION

Re Manufacturers Trust Company et al.

[File Nos. 31-183, 31-178. Release No. 1504.]

Intercorporate relations, § 19.2 — Holding company exemption — Investment by bank.

1. A bank which has acquired public utility securities as the result of original loans, or of protecting the security of those loans after default and realization of collateral became necessary, may properly be held temporarily a holding company, under § 3(a)(4) of the Public Utility Holding Company Act of 1935, although additional investments in such securities have been made, not strictly for purposes of liquidation in connection with a bona fide debt, but primarily because they were considered good business in connection with the other investment, where the amount of the additional investment is such that it would not itself have constituted the bank a holding company and where it is so small in comparison with the other securities directly acquired in connection with the liquidation that it has no appreciable effect in constituting the bank a holding company; and the bank is entitled to exemption under § 3(a)(4) subject to the limitation of Rule U-3A3-1 relating to the time limitation for such exemption, p. 198.

Intercorporate relations, § 19.2. — Holding company exemptions.

2. A company organized primarily to act as a holding company for a parent bank's equity interest in public utility securities, which itself made no loans upon which it was later required to realize collateral but acquired securities for the purpose of enabling the bank to liquidate its loans, and which company has taken an active part in the management of the utilities in whose securities it has invested, is not entitled to exemption under § 3(a)(4) of the Public Utility Holding Company Act of 1935, since it is not "temporarily" a holding company and its acquisitions were not made for purposes of liquidating debts contracted in its favor. p. 204.

RE MANUFACTURERS TRUST CO.

Intercorporate relations, § 19.2 — Holding company exemptions — Predominance as public utility.

3. An operating public utility corporation exercising control and management, through common stock ownership, over a subsidiary operating company which is larger than the parent corporation, is not entitled to exemption from registration as a holding company under § 3(a)(2) of the Public Utility Holding Company Act of 1935, even though preferred stocks have temporary voting power by reason of default in dividends, where the preferred stock is scattered in relatively small holdings and the control and management have not been affected by such voting power; and the fact that a large number of bonds and other securities of the subsidiary are owned by the public, reducing the interest of the parent corporation, only makes it the more necessary that the parent company be subject to regulation as a holding company, p. 205.

[April 20, 1939.]

APPLICATIONS *for exemption from the provisions of Public Utility Holding Company Act of 1935 under § 3(a)(4) and under § 3(a)(2); exemption granted to one company and denied to two other companies.*

By the COMMISSION: Manufacturers Trust Company and Utility Service Company have filed an application (File No. 31–183) for exemption from the provisions of the Public Utility Holding Company Act of 1935, under § 3(a)(4) of that Act.[1] Eastern Minnesota Power Corporation has filed an application (File No. 31–178) asking for a similar exemption under § 3(a)(2) of the Act.

Because of the intercorporate relations between the applicants and in order to expedite the presentation of the relevant facts, the applications were consolidated for hearing. After appropriate public notice, a hearing was held before a trial examiner. Requested findings of fact and briefs have been submitted; a trial examiner's report and oral argument have been waived by the parties; and the Commission, after considering the record, makes the findings herein contained.

Section 3(a) of the Public Utility Holding Company Act of 1935, 15 USCA § 79c(a)(2)(4) (hereinafter sometimes referred to as the act) provides in part as follows:

". . . The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except in so far as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if . . .

"(2) such holding company is predominantly a public utility company

[1] Manufacturers' Trust Company also contends that it is entitled to exemption under § 3(a)(3) of the Public Utility Holding Company Act of 1935. It did not include in its application the information required to support this claim, but requested that in the event its application under § 3(a)(4) were denied, it be afforded an opportunity to furnish the information required under Rule U–3A–1 with respect to applications based upon § 3(a)(3).

whose operations as such do not extend beyond the state in which it is organized and states contiguous thereto; . . .

"(4) such holding company is temporarily a holding company solely by reason of the acquisition of securities for purposes of liquidation or distribution in connection with a bona fide debt previously contracted or in connection with a bona fide arrangement for the underwriting or distribution of securities; or . . ."

Organization of Utility Service Company

Manufacturers Trust Company (sometimes hereinafter referred to as "Manufacturers" or as the "bank") organized Utility Service Company in February, 1932, and subscribed to all of its capital stock, consisting of 10 shares of no par value. This subsidiary was organized because the directors of the bank were of the opinion that a separate corporation should own and direct the operations of the bank's utility interests in order to segregate them as much as possible from the banking business. Utility Service Company has always been operated as a department of the bank. The operating public utility companies controlled by Manufacturers and Utility Service Company pay no management or service fees to, and are not creditors of, Manufacturers or Utility Service Company.

Applicants' Security Holdings[2]

Manufacturers Trust Company owns directly 200,000 shares of common stock (approximately 15 per cent of the total shares outstanding presently having voting rights) of New England Public Service Company, a registered holding company.

Utility Service Company owns 48,483 shares of common stock of New England Public Service Company, which together with the direct holdings of Manufacturers Trust Company constitute 19.1 per cent of all outstanding voting securities of that company. In addition, Utility Service Company owns all of the common stock and approximately two-thirds of the preferred stock (or about 92 per cent of the voting securities) of Eastern Minnesota Power Corporation. Utility Service Company also owns all of the common stock and approximately 27 per cent of the preferred stock (being about 61 per cent of the total voting securities) of The Marion-Reserve Power Company, a public utility operating company.

Eastern Minnesota Power Corporation is both a public utility operating company and a holding company. It owns 10,552 shares of common stock of Wisconsin Hydro Electric Company, being all of the common stock and 47 per cent of the total voting securities outstanding.[3]

The Application of Manufacturers Trust Company under § 3(a)(4) 15 USCA § 79c (4)

[1] As a requisite to exemption under § 3(a)(4) of the Public Util-

[2] A chart showing the relationship of the applicants and their subsidiaries appears at the end of this opinion.

[3] The preferred stocks of Eastern Minnesota Power Corporation, Wisconsin Hydro Electric Company, and New England Public Service Company have voting rights at the present time because of arrearages in dividends. The preferred stock of The Marion-Reserve Power Company has equal voting rights with common stock, share for share.

ity Holding Company Act a holding company must be *temporarily* such solely by reason of the acquisition of securities for purposes of liquidation or distribution in connection with a bona fide debt previously contracted (or in connection with a bona fide arrangement for the underwriting or distribution of securities). It is therefore necessary to examine the circumstances surrounding the acquisition by Manufacturers Trust Company of its utility investments.

The holdings of Manufacturers, both directly and through Utility Service Company, are largely the result of certain loans made by Chatham Phoenix National Bank and Trust Company, a predecessor of Manufacturers which was merged into the latter in February, 1932. These loans, as outstanding at the date of the merger, were as follows: $1,000,000 note of Peoples Light & Power Corporation, executed during November, 1930, on which small principal payments had been made; $1,000,000 note of Ohio Electric Power Company, dated January 4, 1932; $1,000,000 note of Columbus, Delaware and Marion Electric Company, dated January 4, 1932.

The note of Peoples Light & Power Corporation was secured by a pledge of all of the outstanding common stock (consisting of 35,000 shares of no par value) and 4,100 shares of $6 preferred stock of Eastern Minnesota Power Corporation. Shortly after the merger of Manufacturers with the Chatham Phoenix Bank, Manufacturers caused the collateral securing this note to be sold at public auction, and it was purchased by Utility Service Company for the balance due on the note, $970,668.55, out of funds advanced by Manufacturers.

Ohio Electric Power Company and Delaware & Marion Electric Company were predecessors of The Marion-Reserve Power Company. Their two $1,000,000 notes were endorsed by National Electric Power Company and by Central Eastern Power Company, both parent companies of the makers of these notes.[4]

In addition to the endorsements of National Electric Power Company and Central Eastern Power Company, each of the two notes was secured by a pledge of 100,000 shares of New England Public Service Company common stock, owned by National Electric Power Company. The note of Ohio Electric Power Company was also secured by 23,000 shares of common stock and 4,000 shares of preferred stock of The Reserve Power and Light Company, and the note of Columbus, Delaware and Marion Electric Company was also secured by a pledge of all the common stock ($90,680 shares) of Ohio Electric Power Company; these securities were owned by Central Eastern Power Company.

After the collapse of the Insull pyramid in 1932, considerable litigation arose with respect to the validity of the Ohio notes and accompanying endorsements and pledges of collateral.[5] In January, 1933, equity proceedings

[4] Central Eastern Power Company was the parent company of Ohio Electric Power Company and Columbus, Delaware and Marion Electric Company. Central Eastern Power Company was a subsidiary of Municipal Service Company which was in turn a subsidiary of National Public Service Corporation which in turn was a subsidiary of National Electric Power Company, a direct subsidiary of Middle West Utilities Company.

[5] Because of the fact that prior to the execution of the two $1,000,000 notes National Electric Power Company had been indebted in substantially the same amounts to the

seeking the appointment of receivers were instituted against Columbus, Delaware and Marion Electric Company. A bondholders' protective committee threatened to foreclose the mortgage securing that company's bonds, the effect of which would have been to render less valuable the obligations of this company. To protect its position Manufacturers caused Utility Service Company to acquire, during the months of February, March, April, and May of 1933, $162,000 in principal amount of these bonds purchased at prices varying from 51½ to 67⅛ and at a total cost to Utility Service Company of $98,487.97. Of these bonds, the major portion was turned over to Manufacturers at cost by Utility Service Company.

The litigation with respect to the Ohio companies was terminated by a settlement in 1934 between all the principal parties. Under the terms of the agreement, Manufacturers (or Utility Service Company, with funds advanced by Manufacturers) paid $935,000 to Penn Central Light and Power Company and to Penn Southern Company and $190,000 to the Irving Trust Company, as trustee in bankruptcy of National Electric Power Company. In return, Manufacturers Trust Company acquired various notes, bonds, shares of stock, and judgments which Penn Central and Penn Southern had of the Columbus, Delaware and Marion Electric Company, The Reserve Power and Light Company, and Central Eastern Power Company. In connection with the litigation and the settlement, Utility Service Company expended approximately $195,000 as expenses of litigation. It was apparently necessary, at least in the judgment of the officers of Manufacturers, for the bank to acquire these interests in order to settle the litigation with respect to the validity of its notes and to prevent a foreclosure of its interests by senior security holders.

Speaking generally, the effect of the settlement was to settle Manufacturers' right to the obligations owned by it. The collateral securing the endorsements made by Central Eastern Power Company was turned over to Manufacturers without the necessity of reducing it to possession. As a result, Manufacturers, or its nominee, Utility Service Company, became the owner, free and clear of all liens and claims, of all of the common stock and some preferred shares of the predecessor companies of the present The Marion-Reserve Power Company,[6] and of 200,000 shares of the

Chatham Phoenix Bank, it was later urged that the act of the subsidiary companies in making these notes and the pledge of collateral by Central Eastern Power Company were without consideration and invalid.

[6] The three predecessor companies of the present The Marion-Reserve Power Company were the Ohio Electric Power Company, The Reserve Power & Light Company, and the Columbus, Delaware & Marion Electric Company. At the time of the settlement Manufacturers and Utility Service Company acquired all of the common stock of these three companies, 4,000 shares (all) of the preferred stock of The Reserve Power & Light Company and 7,467 shares (49 per cent) of the preferred stock of Columbus, Delaware and Marion Electric Company. The bank also owned various bonds, judgments, and notes to which it acquired clear title as a result of the settlement.

Various consolidations were effected between the three Ohio companies, and Manufacturers caused the cancellation of certain indebtedness in exchange for the issuance of additional stock. Following these transactions and effective as of October 11, 1938, the properties of all three companies became owned by a new merged corporation, The Marion-Reserve Power Company. As a result of this merger, Manufacturers owned the equity securities of the new company described

common stock of New England Public Service Company.

The investments by Manufacturers Trust Company, its predecessor Chatham Phoenix National Bank and Trust Company, and its nominee Utility Service Company, in the acquisition of these utility securities, up to and including the time of the settlement, may be summarized as follows:

Note of Columbus, Delaware and Marion Electric Company	$1,000,000
Note of Ohio Electric Company	1,000,000
Purchases of bonds of Columbus, Delaware and Marion Electric Company (1933)	98,488
Payment to Penn Central and Penn Southern Corporations	935,000
Payment to Irving Trust Company, as trustee in bankruptcy of National Electric Power Corporation	190,000
Cost of litigation	195,000
Total Ohio properties	$3,418,488
Unpaid balance of note of Peoples Light & Power Company (bid for collateral consisting of Eastern Minnesota securities)	970,669
Total all properties	[7] $4,389,157

The foregoing expenditures bear a direct relationship to the protection of the original loans. In addition to the foregoing investments, Utility Service Company subsequently purchased on the open market 152 shares of Ohio Electric Power Company preferred stock at a cost of $3,010. Utility Service Company also bought 45 shares of preferred stock of Columbus, Delaware and Marion Electric Company for $16 per share or a total of $720. The purchases of these shares were made shortly before the enactment of the Public Utility Holding Company Act of 1935. According to applicant's witnesses, they were acquired in the belief that there would be a great deal of difficulty in working out the indebtedness owed by the Ohio companies and that the acquisition of such stock would facilitate the working out of a constructive readjustment of this company's capital stock. All of these shares were later transformed into a part of the present holdings of The Marion-Reserve Power Company.

In October, 1935, Utility Service Company purchased 48,483 shares of common stock of New England Public Service Company. These shares were part of a block of 170,000 shares originally pledged as security for a bond issue by National Electric Power Company. The block was offered for sale by the trustees under the bond indenture, and the shares were purchased by the three principal owners of New England Public Service Company common stock in proportion to their previous respective ownerships. According to applicants' witnesses, the reason for this investment was to protect the previous investment already made in this company. The cost of the shares to Utility Service Company was $14,687.50.

Utility Service Company also acquired, at a cost of $20,049, 2,521 shares of preferred stock of the Eastern Minnesota Power Corpora-

above and $750,000 principal amount first mortgage bonds (issued by Ohio Electric Power Company and assumed by the new company) and $162,000 principal amount of 10-year serial notes of the new company.

[7] It should be noted that the foregoing amounts do not include interest from the various dates of investment. In return for the expenditure of the foregoing amount, Manufacturers has received in cash approximately $2,356,000 and (in addition to its equity securities) bonds and notes of the Ohio companies aggregating in face amount approximately $912,000.

tion,[8] in addition to the 4,100 shares of such stock and the common stock which had been acquired at the sale of collateral securing the Peoples note.

The reason for acquisition of the additional shares of stock of Eastern Minnesota Power Corporation was, according to applicants' witnesses, to facilitate working out a constructive program and to salvage as much as possible for local stockholders to whom stock had been previously sold under a customer-ownership program. According to applicant it was desired to avoid having this stock outstanding in the hands of the public.

Recapitulating the various investments of Manufacturers and Utility Service Company in their various subsidiaries which were not made directly for the protection of the original loans, the amounts may be stated as follows:

Additional shares of Ohio properties	$3,730
New England Public Service Company	14,687
Eastern Minnesota Power Corporation	20,049
Total	$38,466

It will be observed that the amount loaned or spent in protecting the loans was over $4,300,000. Therefore, the great bulk of the investments here involved is either the result of the original loans or of protecting the security of those loans after defaults occurred and realization of collateral became necessary.

[8] These shares were acquired as follows:

1,305 shares, purchased by an affiliate of Manufacturers from Power Water Gas Securities Company, in November 1936, for	$12,800
190 shares, purchased from A. C. Allyn and Company, in 1938, at $5–¾	1,093
1,026 shares, bought from Peoples Light and Power Corporation, in August 1938, at $6 per share	6,156
Total	$20,049

The additional investments cannot in our opinion be said to have been strictly "for purposes of liquidation in connection with a bona fide debt." The evidence indicates that these investments were made primarily because they were considered good business in connection with the other investments. Applicant's witnesses however, have testified that the purchase of these securities improved the position of Manufacturers and of Utility Service Company in respect to their other securities and will render the liquidation of such securities more practicable.

These additional investments aggregate less than 1 per cent of the total investment by the bank in its utility properties. It may also be observed that the amounts of such securities are, from the standpoint of proportionate ownership or control over the various corporations involved, relatively negligible. Manufacturers' control over the companies results primarily from its ownership of the stocks acquired directly in connection with the liquidation of the loans.

Section 3(a)(4) requires that the holding company, to be entitled to exemption, must be such *solely* by reason of the acquisition for purposes of liquidation or otherwise as specified. In the present case, Manufacturers' acquisitions in connection with the loans were sufficient by themselves to make it a holding company; the amount of the additional investments is such that it would not itself have constituted applicant a holding company; and it is so small in comparison with the other securities directly acquired in connection with the liquidation that it has no appreciable effect in

constituting applicant a holding company. Accordingly, it is our opinion that Manufacturers Trust Company may properly be held temporarily a holding company solely by reason of the acquisition of securities for purposes of liquidation in connection with the debts contracted in favor of Manufacturers' predecessor bank.

We may not grant an exemption under § 3 (a) if or to the extent that such exemption would be detrimental to the public interest or the interest of investors or consumers. We have recently amended Rule U-3A3-1, which provides certain general exemptions in favor of banks with respect to securities acquired in accordance with the terms of § 3(a)(4). The period during which banks may in the future receive the full exemptions thereunder is limited to two years; after that period the exemption will be subject to limitations with respect to the right to vote utility securities, to make loans to utility or holding companies, to receive deposits, to perform services, and similar matters.[9]

Rule U-3A3-1 was issued and recently amended after careful consideration and may be considered generally to express the views of this Commission concerning public policy with reference to the exemption of banks from the provisions of the Holding Company Act. The restrictions are in accordance with the spirit of the statutes and judicial decisions of New York (the state wherein Manufacturers Trust Company is incorporated) and of the United States with reference to national banks. Under the statutes and decisions banks may acquire and hold common stocks only in connection with the realization of collateral on loans and such stock should be disposed of within a reasonable time.[10]

[9] Rule U-3A3-1, as amended, provides in part as follows:

". . . (b) Except as provided in paragraph (c) of this rule, any bank which, by reason of the acquisition of securities solely in a fiduciary capacity, or as collateral, or in connection with liquidation of a bona fide debt, or in connection with a bona fide arrangement for the underwriting or distribution of securities, directly or indirectly owns, controls, or holds with power to vote, 10 per cent or more of the outstanding voting securities of a public utility company or holding company shall nevertheless be exempt from any obligation, duty, or liability imposed by the act upon such bank as a holding company:

"*Provided, however,* that after January 1, 1941, the exemption in this rule shall not be applicable to a bank which before or after such date for a period exceeding two years has continuously been and thereafter remains, directly or indirectly, the beneficial owner of 10 per cent or more of the outstanding voting securities of a public utility company or holding company, *if* after January 1, 1941,

"(1) Such bank, or any person acting for or controlled by such bank, votes, by proxy or otherwise, for directors or upon any other matter any public utility company or holding company securities owned by it for such period, except in favor of a matter which has been or will be the subject of a declaration or application filed with the Commission under the act; or

"(2) Such bank makes or, except after an order of the Commission, with notice and opportunity for hearing, renews any loan to such public utility company or holding company or any associate company thereof, or enters into any other financial transaction with any such company; or

"(3) Such bank receives deposits from such public utility or holding company or any associate company thereof, or acts as trustee under any indenture to which any of such companies is a party, or as transfer agent for securities of any of such companies, or in any other manner as financial agent for any of such companies. . . ."

[10] See Cahill's Consolidated Laws of New York (1937 Supplement), Chap. 3, § 97(b) (as amended, Laws, 1937, Chap. 619); U. S. Rev. Stats. § 5136 (12 USCA § 24); see also California National Bank v. Kennedy (1897) 167 U. S. 362, 42 L. ed. 198, 17 S. Ct. 831; First National Bank of Concord v. Hawkins (1899) 174 U. S. 364, 43 L. ed. 1007, 19 S. Ct. 739; First National Bank of Ottawa v. Converse (1906) 200 U. S. 425, 50 L. ed. 537, 26 S. Ct. 306.

Manufacturers' exemption should be subject to the limitations imposed by this rule. An exemption will therefore be granted to Manufacturers Trust Company subject to the various terms of Rule U-3A3-1 as it is now in force or as it may hereafter be amended.

The Application of Utility Service Company

[2] Utility Service Company also asks for exemption under § 3(a)(4). As we have pointed out, an exemption may be granted under that subsection only to a company which is "temporarily" a holding company solely by reason of the acquisition of securities for purposes of liquidation or distribution in connection with a bona fide debt previously contracted (or in connection with a bona fide arrangement for the underwriting or distribution of securities).

Considering first the question of whether Utility Service Company is only "temporarily" a holding company, it will be recalled that the sole purpose of organizing this company was to act as a holding company for the bank's equity interests in public utility securities. The Utility Service Company has taken an active part in the management of its utility subsidiaries. It has caused the various Ohio companies to improve their respective capital structures and to refund their obligations so as to increase the value of the bank's holdings and to make its management more effective. Representatives of Utility Service Company have been placed upon and have dominated boards of directors of the subsidiaries,[11] and Utility Service Company has taken an active part in the management of these utilities. Generally speaking, an active control is exercised by Utility Service Company and, so far as Utility Service Company is concerned, the control is not of a temporary character but is of the same character as that exercised by other utility holding companies.[12]

It may also be observed that Utility Service Company was at no time a creditor of Peoples Light and Power Corporation, Ohio Electric Power Company, Columbus, Delaware and Marion Electric Company, or of the other corporations which were makers or endorsers of the original obligations here involved. In other words, Utility Service Company at no time made loans upon which it was later required to realize collateral. The acquisitions of Utility Service Company, while they may have been for the purpose of enabling Manufacturers Trust Company to liquidate the latter's loans, were not made for purposes of liquidation of debts contracted in favor of Utility Service Company. Accordingly, Utility Service Company is not entitled to an exemption under § 3(a)(4), both because it is not "temporarily" a holding com-

[11] Directors of Utility Service Company constitute four out of the seven directors of The Marion-Reserve Power Company, three out of five directors of Eastern Minnesota Power Corporation, and four out of five directors of Wisconsin Hydro Electric Company.

[12] In this respect, the case is very different from the circumstances in such of our decisions as in Re Halsey Stuart & Co. (1936) 1 S. E. C. 323, 16 P.U.R.(N.S.) 107; Re National Supply Co. of Delaware (1936) 1 S. E. C. 742; and Re Stone & Webster & Blodget (1938) 3 S. E. C. 234. In each of these three cases securities were held temporarily and active control over management was not exercised.

pany and because its acquisitions were not made for purposes of liquidating debts contracted in its favor. The application for exemption of Utility Service Company must therefore be denied.

Application of Eastern Minnesota Power Corporation

[3] Eastern Minnesota Power Corporation desires an exemption pursuant to § 3(a)(2), which authorizes us to grant an exemption where the applicant is "predominantly a public utility company whose operations as such do not extend beyond the state in which it is organized and states contiguous thereto."

Eastern Minnesota Power Corporation has one subsidiary, the Wisconsin Hydro Electric Company, of which it owns all of the common stock. Because of arrearages in dividends, preferred stock of Wisconsin Hydro Electric Company has equal voting rights, share for share, with common stock, and the present voting power of the common stock is approximately 47 per cent. However, the preferred stock, all of which is publicly held, is scattered in relatively small holdings, and the control and management of Wisconsin Hydro Electric Company by Eastern Minnesota Power Corporation have not been affected by the voting power temporarily vested in the preferred stock. At the time of publication of the last annual reports, four out of five directors and the principal executive officers of both companies were identical.

As an operating company, Wisconsin Hydro Electric Company is *larger* than its parent, the Eastern Minnesota Power Corporation. For the year 1937, for example, gross utility operating revenues (after elimination of intercompany sales) of the Minnesota company were $339,369 as compared with $601,843 for those of the Wisconsin Company. A comparison of other statistics of the two companies, such as of assets, sales of electricity, numbers of customers served, all show that the Wisconsin Company is, from the operating standpoint, larger than its parent.[13]

In addition to the preferred stock amounting to $1,195,300, Wisconsin Hydro Electric Company has outstanding in the hands of the public $2,077,000 first mortgage 5 per cent bonds due 1947.

In order for us to grant an exemption under § 3(a)(2) we must find that the applicant is "predominantly" a utility rather than a holding company. It seems difficult to find any theory on which it could be said that Eastern Minnesota Power Corporation

[13] Some of the comparative statistics of these two companies may be summarized as follows:

	Eastern Minnesota Power Corporation	Wisconsin Hydro Electric Company	Per Cent of Wisconsin to Minnesota Company
Fixed gross utility assets	$3,426,932	$4,185,976	122.1%
Fixed net utility assets (Property and plant)	3,295,209	3,973,983	125.1%
Kilowatt hours sold (Eliminating intercompany sales)	7,416,523	14,162,870	190.9%
Utility consumers served (Electric consumers only; Wisconsin Company had also 2,592 gas customers)	5,045	6,592	130.6%

The percentage of gross operating revenues, computed on the foregoing basis, is 177.4%.

is "predominantly" a utility company where its subsidiary carries on a larger business than does the applicant itself.[14]

Light in the proper interpretation of this section is given by the Senate Report (74th Congress, First Session, Report No. 621, p. 24) where this provision is stated to govern a case where "the company is itself a utility, being a holding company only in form by reason of the fact that it has one or more minor subsidiary utilities."

The House Report contains similar language (74th Congress, First Session, Report No. 1318, p. 10).

We have had occasion to grant exemptions under the section at various times, but in most of the cases where applications were granted the amount of gross operating revenues of the subsidiaries did not exceed 10 per cent of the total of the systems. Although in one case such operating revenues approximated 20 per cent, in no case have we granted an application under this section where the revenues of the subsidiary have exceeded those of the parent applicant.

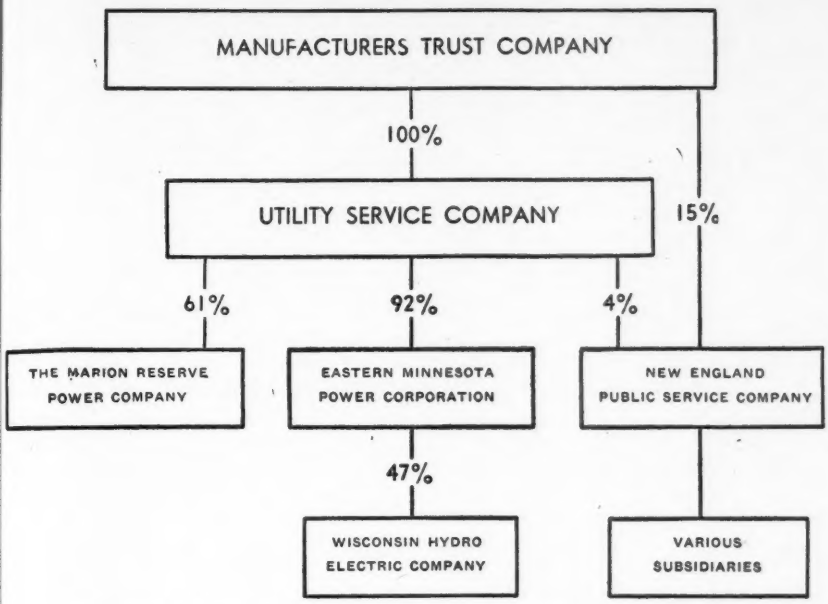
The company has urged that since a large number of bonds and other securities of Wisconsin Hydro Electric Company are owned by the public, the effect thereof is to reduce the interest of Eastern Minnesota, so that as a result the proprietary interest of the Minnesota Company in the Wisconsin Company's total income is reduced to as little as 25 per cent. In our opinion, however, the fact that certain of the securities are publicly held makes it all the more necessary that the parent company, which by ownership of equity securities actively controls and manages the subsidiary, be subject to regulation as a holding company.[15]

An order will therefore be entered denying the application of Eastern Minnesota Power Corporation for exemption from registration as a holding company.

Frank, Commissioner, not participating.

[14] The word "predominant" has been defined as follows (Funk & Wagnalls New Standard Dictionary, 1937): "Superior in power, influence, effectiveness, number, or degree; having ascendency or control; prevalent over others."

[15] Congress evidently had such considerations in mind in enacting Clause (B) of § 3(a)(3) which permits an exemption in certain cases *if* substantially all the outstanding securities of subsidiaries are owned by the holding company. Although the point was not discussed, our decision in Re Rockland Light & Power Co. (1936) 1 S. E. C. 354, noted that all of the outstanding securities of that applicant's subsidiary companies were owned by the parent, and that circumstances may have been considered as a factor in granting the exemption in that case.



FIGURES REPRESENT PERCENTAGES OF VOTING SECURITIES

ORDER

Manufacturers Trust Company and Utility Service Company having made application for exemption from the provisions of the Public Utility Holding Company Act of 1935 pursuant to § 3(a)(4) thereof; Eastern Minnesota Power Corporation having made application for exemption from the provisions of the Public Utility Holding Company Act of 1935 pursuant to § 3(a)(2) thereof;

The applications having been consolidated for hearing; a hearing having been duly held after appropriate public notice; the record in this matter having been duly considered; and the Commission having made appropriate findings of fact;

It is *ordered* that Manufacturers Trust Company be and is hereby exempted from all of the provisions of the Public Utility Holding Company Act of 1935 applying to holding companies, subject to the limitations imposed by Rule U-3A3-1, as now in force or as hereafter amended, to the same extent as banks granted a general exemption thereunder; and

It is *further ordered* that the applications for exemption of Utility Service Company and Eastern Minnesota Power Corporation be and they hereby are denied.

ILLINOIS COMMERCE COMMISSION

City of Geneseo

v.

Illinois Northern Utilities Company

[No. 26345.]

Franchises, § 56 — Rights after expiration — Occupancy of streets — Electric utility.

1. Continued occupancy of city streets by an electric utility company after expiration of a franchise ordinance, in a state where the Commission is vested with the exclusive power of regulation and control of all means and instrumentalities used by the utility, is not unlawful, p. 209.

Service, § 57 — Powers of Commission — Discontinuance in municipality — Expiration of franchise.

2. The question whether or not a public utility should discontinue service in a municipality after the expiration of its franchise ordinance is a matter to be determined by the Commission, p. 209.

Service, § 224 — Discontinuance in municipality — Franchise expiration — Public convenience and necessity.

3. A determination by the Commission of the question whether a public utility should discontinue service in a municipality after expiration of its franchise ordinance should be made in accordance with the just and reasonable requirements of public convenience and necessity, that is, whether or not the utility serves a useful purpose in the city as contemplated by the Public Utilities Act, p. 209.

Service, § 63 — Powers of Commission — To order discontinuance.

4. The Commission, in determining whether or not a public utility should discontinue service in a municipality after the expiration of its franchise ordinance, may not arbitrarily say that the company must remove its poles and wires from the streets and public places and cease to do business therein, but the order issued by the Commission should follow the spirit of the statute, which requires that any action taken by it be just and reasonable, p. 209.

Service, § 213 — Discontinuance in municipality — Franchise expiration — Public need — Competitive municipal plant.

5. An electric utility company should be permitted to continue to serve its customers in a city after expiration of its franchise when a substantial portion of the population is served by the company, even though the municipality has constructed and is operating a competing electric system, p. 209.

[April 26, 1939.]

COMPLAINT *by municipality seeking order from Commission requiring that an electric utility company remove its poles and wires from and discontinue furnishing service within the municipality; dismissed.*

By the COMMISSION: This is a complaint by the city of Geneseo, Henry county, Illinois, against Illinois Northern Utilities Company seeking an order from the Commission requiring that the respondent company remove its poles and wires from and discontinue furnishing electric service within the complainant municipality. A similar complaint was filed in Case No. 26346 by the village of Heyworth, McLean county, Illinois, against the Central Illinois Electric and Gas Company. The complaints were heard separately. A joint brief and a joint reply brief were filed by the municipalities. Separate briefs were submitted by the companies. Joint oral argument of the two cases was made before the Commission and the examiners who heard the cases.

[1–5] Illinois Northern Utilities Company (hereinafter sometimes called "Illinois Northern Company") has furnished electricity for public use in Geneseo for many years. In 1933 the ordinance granted in 1923 by Geneseo to the Illinois Northern Company expired. On or about the date of expiration of the ordinance the municipality acting pursuant to the provisions of the Municipal Ownership Act (Ill. Rev. Stats. 1937, Chap. 111⅔ §§ 96–110) constructed and put in operation a municipally owned electric generating plant and electric distribution system and began the furnishing of electric service for public use within the municipality. No new ordinance or an extension of the expiring ordinance was granted by Geneseo to the Illinois Northern Company. On the contrary, the municipality passed an ordinance requiring the respondent company to remove its poles and wires and cease furnishing electric service within the municipality. The respondent company refused to comply with this ouster ordinance. The municipality instituted court proceedings to compel the respondent company to obey the ouster ordinance. The case was decided, adversely to Geneseo, by the supreme court of Illinois in Geneseo v. Illinois Northern Utilities Co. (1936) 363 Ill. 89, 14 P.U.R. (N.S.) 61, 1 N. E. (2d) 392.

The complaint filed herein by Geneseo alleges that the respondent company is occupying the streets with poles and wires and is furnishing electric service in the municipality without authority from, and contrary to the ordinance of, the municipality; that the complainant municipality owns and operates its own electric generating plant and distribution system; that complainant's municipal plant serves a majority, both in load and number of customers, of the electric business in the municipality; that the complainant's municipal plant has adequate capacity to handle all of the electric business in the municipality; that the municipal system and the respondent company's system parallel each other generally on opposite sides of the streets and in some locations the systems are in such proximity to each other as to be dangerous to life and limb; that such duplication of facilities is wasteful and unbusinesslike; that the presence of the respondent company's plant competing with the complainant's plant is injurious to the business of the municipal plant and is thus injurious to the customers and citizens of the complainant; and the last allegation of the complaint is:

"14. That the supreme court of

Illinois decided in the case of Geneseo v. Illinois Northern Utilities Co. 363 Ill. 89, 14 P.U.R.(N.S.) 61, 1 N. E. (2d) 392, that the power to compel a utility company whose franchise expired, to vacate the public streets of a municipality, has been withdrawn from such municipality and has been vested in the Illinois Commerce Commission."

The answer filed by the Illinois Northern Company admits that the respondent company has no existing grant of authority from the complainant municipality to occupy the streets or furnish electric service; admits that the complainant had notified it to vacate and that it had refused; admits the duplication of facilities and competition with the municipal plant; and "admits the allegations in said paragraph" 14, above quoted. The answer denies, however, that the continued occupancy of the streets and the furnishing of electric service by the respondent company is unlawful, alleging that it is authorized by the Public Utilities Act to furnish electricity for public use in the municipality, and denies that the duplication of facilities is dangerous, but alleges that if such is the case, it is of the complainant's own making because the respondent company's facilities were there first. Defenses are also set up in the answer that the complaint does not set forth any act or things done or omitted to be done by the respondent company in violation of any provision of the Public Utilities Act, or of any rule or order of the Commission; that the facilities of the respondent company in the complainant municipality are duly and lawfully installed and operated under a franchise from the state of Illinois pursuant to and in accordance with the provisions of the Public Utilities Act and are part of an integrated electric public utility system and are used not only for supplying electric service in the complainant municipality, but for furnishing electric service in territory beyond the municipal limits; that the discontinuance by respondent of its service in the complainant municipality would be contrary to public convenience and necessity and would militate against the ability of the respondent company to furnish adequate and efficient service at reasonable rates in the remainder of the territory it serves.

Aside from the fact admitted by respondent company that it is occupying the streets with its poles and wires and furnishing electric service in the complainant municipality without present authority so to do from the complainant municipality, the evidence presented shows that the respondent company has been furnishing electric service for public use in Geneseo since 1912; that in 1933 complainant constructed a municipal electric plant; that Geneseo has a population of 3,400; that the municipal plant is, and since the date of its completion, has been furnishing satisfactory service to its customers; that the municipal plant was financed through the issuance and sale of municipal certificates maturing serially over a period of years and payable solely out of the revenues from the municipal plant; that there is no default in the payment of principal or interest with respect to these certificates; that the municipal plant has capacity to serve the electricity needs of all the users in the municipality; that the municipal plant has 1,078 customers and

the Illinois Northern Company 504; that the number of kilowatt hours furnished by the municipal plant is approximately three times the number furnished by the respondent company; that there is little or no difference between the municipal rates and the rates of the respondent company; that the municipality has passed an ordinance reducing its rates if and when the respondent company ceases to be a competitor; that in a few instances the lines of the municipal plant were installed in closer proximity to the lines of the respondent company than good engineering practice would sanction; that there have been no serious consequences because of these construction irregularities; that the complainant municipality knows of their existence and that it has the means and ability to correct them, with but little expense. The allegation in the complainant that the proximity of the municipal plant's lines to the lines of the respondent company results in a dangerous situation was not supported by proof and such alleged menace was not argued by complainant in the written briefs or in the oral argument.

It further appears from the evidence that the respondent company has no generating plant in the complainant municipality; that its distribution facilities in the complainant municipality are a part of an integrated electric public utility system serving a large area comprising urban and rural communities in approximately 4,500 square miles of territory; that its service and facilities in complainant municipality are inspected periodically by the Commission and are of a satisfactorily high standard; that the capital structure of the respondent company is based upon its respective properties as a whole; that its revenues and operating expenses are treated and accounted for on a system-wide basis; that its classifications of service and schedules of rates likewise are established on a system-wide basis, and that the distribution system of the respondent company in the complainant municipality is also used in part to energize lines extending into and serving eighty-one customers in the neighboring rural areas.

It further appears from the evidence that if the respondent company were to remove its electric lines and discontinue its investment and operations in this municipality, it would suffer both a capital loss and an operating loss. The capital loss is estimated at $14,480. This is exclusive of an estimated expense of $4,850 for removal of its facilities from Geneseo. The capital loss of $14,480 is arrived at by subtracting the salvage value estimated at $15,800 from the depreciated cost of $30,280 for the facilities, the installation cost of which was, exclusive of indirect construction costs, approximately $54,534. The company would also suffer an annual operating loss estimated at $8,879. This figure was determined by subtracting from the company's electric revenues for business in Geneseo for the year ended November 30, 1937, amounting to $17,726 the sum of $8,879, being the total of those expenses which would have been eliminated had the company not been furnishing electricity in Geneseo during that year. In addition, if the company removed its lines from Geneseo and continued to serve its eighty-one customers in the adjacent rural area, it would have

to erect at a cost of approximately $5,700 a substation outside of the city. The company would then have an investment in lines and substation of approximately $73,720 to serve these eighty-one rural customers.

Complainant and respondent place opposite interpretations upon the decision of the supreme court of Illinois in the ouster suit by Geneseo against the respondent company (363 Ill. 89, 14 P.U.R.(N.S.) 61, 1 N. E. (2d) 392). Complainant contends that as a municipality it is vested with sovereign power to regulate and control the use and occupation of its streets by the poles and wires of respondent public utility and that upon the expiration of the ordinance permitting respondent so to occupy the streets complainant has, as a matter of law, the right to oust respondent. Complainant argues that the holding of the supreme court of Illinois in the Geneseo Case cited above is not inconsistent with the existence of this claimed right. Complainant construes this Illinois supreme court decision as recognizing this right as inherent in a municipality and as simply prescribing that the proper mode of exercising it is by complaint made to the Commission and not by action in court. Respondent's position is that complainant has no such right; that such right as a municipality formerly may have had to oust a public utility upon the expiration of its ordinance, the legislature has, by the enactment of the Public Utilities Act, withdrawn from the municipality and lodged in the Commission, and that the above Geneseo Case squarely establishes this principle.

In the complaint for ouster filed by Geneseo in the circuit court of Henry county (the lower court proceedings in 363 Ill. 89, *supra*), Geneseo alleged the expiration of the ordinance of the Illinois Northern Company, the construction of the municipal plant, and the passage of an ouster ordinance ordering the Illinois Northern Company to vacate the streets and discontinue the furnishing of electric service in Geneseo. In effect, Geneseo asserted that it had the right, as a matter of law, to oust the company. The answer of the company admitted the expiration of its ordinance; admitted the construction of the municipal plant and the passage of the ouster ordinance and set up as a defense that this Commission had exclusive power to determine whether or not the company should discontinue its operations in Geneseo; that this Commission had not ordered the company to discontinue its operations in Geneseo and that, therefore, the suit was prematurely brought.

If it were a prerequisite to lawful occupancy of the streets that regardless of whether respondent's continued occupancy of the streets served the public convenience and necessity, respondent must possess a grant or permit from Geneseo, then it would necessarily follow that the respondent's occupancy was unlawful because respondent admitted it held no grant or permit. Likewise it would be true that if respondent's occupancy was thus unlawful, Geneseo would have the right to oust respondent. Having the right to oust respondent, Geneseo would have the power to enact an ordinance to enforce that right. The power to enforce an ordinance proceeds from the power to enact an ordinance. However, if respondent's oc-

cupancy without grant or permit from Geneseo was not of itself unlawful, the ouster ordinance was invalid and unenforceable. If the lawfulness of respondent's occupancy depends, not on whether respondent held a grant or permit from Geneseo, but on whether respondent was serving the public convenience and necessity, then the above-mentioned defense of respondent was well founded, and, in the absence of an order of the Commission finding that such occupancy was not serving the public convenience and necessity, the ouster suit was prematurely started. Obviously, lawfulness of occupancy cannot be separated from lawfulness of operation. The circuit court held that Geneseo did have the right to oust the company and sustained Geneseo's motion to strike the defense as being insufficient.

The supreme court, on the appeal, held that the circuit court erred in striking the answer of the company. From the following language of the supreme court, 363 Ill. at pp. 91, 92, of its decision in the Geneseo Case, *supra,* it is clear that the question of the right of Geneseo, as a matter of law, to oust the respondent upon the expiration of the franchise ordinance was in issue:

"The legal issues made by the answer, in effect, are that the defendant is a public utility operating under the Public Utilities statute and within the jurisdiction of the Commerce Commission; that the requirements of the Public Utilities Act prohibit the defendant, without the consent of the Commerce Commission, from ceasing to furnish electric service to the plaintiff and prohibit the city from moving defendant's transmission facilities from the streets unless authorized by the Commerce Commission; *that the city is without legal authority to prohibit the use or occupation of the streets in the city by the defendant for its electric distribution system and is without power to maintain this suit.*" (Italics supplied.)

After thus defining the issues, the court referred to the scope and purpose of the Public Utilities Act, as follows (363 Ill. at pp. 94, 95):

"The Utilities Act is broad and comprehensive. It originated a new system in relation to public utilities and their supervision, regulation, and control, regulatory power over the issuance of securities, the type of service to be furnished, what new service might be undertaken in behalf of the public interest, with power in the Commission to determine whether existing service might be abandoned or discontinued, to obviate and prevent new competition which would be of no advantage to the public, by requiring a public utility to procure a certificate of convenience and necessity before engaging in or undertaking a new enterprise, and where there was already existing a public utility, as well as competing public utilities, to safeguard both the public and the utilities by the fixing of fair, reasonable, and nondiscriminatory rates."

And then the ruling that the Commission, and not the city of Geneseo, was vested with the power to determine whether respondent should discontinue its public utility business in Geneseo, the court said (363 Ill. at p. 97):

"The power to determine whether the defendant shall continue or cease

its utility business in the city rests with the Commission."

Then, finally, in holding that Geneseo did not, as a matter of law, have the right to oust respondent, the court said (363 Ill. at pp. 97, 98):

"To permit the city to exercise control over the instrumentalities of a public utility occupying the city streets would be to give to the city in that respect concurrent jurisdiction with the Commission of a public utility, a result not contemplated by the statute, and one which cannot be drawn therefrom by a legitimate interpretation thereof. The plaintiff was without the legal power and authority to maintain the proceeding." (Italics supplied.)

Two further contentions made by complainant in the present case were urged by complainant in the ouster suit and were discussed in the opinion of the supreme court. The first is the contention made by Geneseo that its governmental powers include the power to enact the ouster ordinance. Concerning this point the court stated (363 Ill. at p. 94):

"It is conceded by the plaintiff that the poles, wires, and equipment of the defendant originally were rightfully placed in the streets of the city. Since that time the city, in its business capacity, has engaged in the sale of electric energy to the public as a competitor of the defendant, and now, by the exercise of a supposed governmental function, it seeks to oust the equipment of its competitor from the streets of the plaintiff; the reason assigned being that the defendant's franchise, given it by the city, has expired. In that situation, is the defendant a trespasser by reason of maintaining its electrical equipment on such streets and has the plaintiff, by reason of its powers, reasonably and necessarily implied by the grant to it in its special charter, the right to eject the defendant's equipment from such streets?"

And then in answer to the question it had posed, the court, after referring to the enactment of the Public Utilities Act, said (363 Ill. at p. 95):

"It is obvious that by this enactment it was the legislative intent to withdraw from local municipalities supervision of public utilities and to vest the same in the Commission with the exclusive power of regulation and control *of all means and instrumentalities used by the utility* in the conduct of its business." (Italics supplied.)

The second contention of complainant is that its sovereign powers over the municipal affairs gave it proprietary title to the streets, and on this point the court stated (363 Ill. at p. 97):

"The situation presented is not that of landlord and tenant or a like relation. The title which the plaintiff originally had in the premises was merely at the sufferance of the true owner, the state. The state has, for public utility purposes, withdrawn that title from the plaintiff and placed it in the Commission."

It follows from the principles announced in the foregoing quotations from the opinion of the Illinois supreme court that we cannot accept, in our consideration of the instant complaint, the contention of complainant that it is unlawful for a public utility to continue to occupy the streets in a municipality after the expiration of the ordinance granted by the municipality to the public utility. We conceive the effect of

the supreme court decision in the Geneseo Case to be that the question of whether or not a public utility should discontinue service in a municipality after the expiration of its ordinance is a matter to be determined by this Commission and that such determination should be made in accordance with the just and reasonable requirements of public convenience and necessity, that is, whether or not the respondent public utility now serves a useful purpose in the city of Geneseo as contemplated by the Public Utilities Act. This Commission is not clothed with arbitrary power and all its determinations must be just and reasonable. It may not arbitrarily say to the respondent company that it must remove its poles and wires from the streets and public places of the city of Geneseo and cease to do business therein; and any order issued by this Commission should follow the spirit of the statute which requires that any action taken by it be just and reasonable. The evidence shows that a substantial portion of the population of Geneseo is served by the respondent company and we are, therefore, of the opinion that a just and reasonable determination of the questions presented to us requires that the respondent company be permitted to continue to serve its customers in the city of Geneseo.

The Commission having considered the evidence, the briefs and oral arguments, and being fully advised in the premises is of the opinion and finds:

(1) that the Illinois Northern Utilities Company, respondent herein, is engaged in the business of furnishing electric service for public use in various municipalities and places in the state of Illinois including the city of Geneseo, Henry county, Illinois, and is a public utility as that term is defined in § 10 of the Public Utilities Act of Illinois and is subject to the jurisdiction of this Commission;

(2) that there are a few instances in which the electric lines of the municipal plant of the city of Geneseo are in closer proximity to the electric lines of the respondent company than would be approved by good engineering practice, but that these irregularities in construction do not present a seriously hazardous situation, and that such irregularities result from the acts of the city of Geneseo and may be corrected without the city incurring large expense;

(3) that the poles, wires, and other electric facilities of the respondent company located in the streets and public places in the city of Geneseo are used in furnishing electric public utility service to 504 customers in Geneseo and in connection with furnishing electric public utility service to eighty-one customers in the adjacent rural territory; and that the discontinuance of respondent's service in, and the removal of its equipment from, Geneseo would result in a capital loss and an operating loss to respondent;

(4) that the complaint filed herein contains no allegations and the record herein contains no evidence either that the electric public utility service furnished by respondent to its customers in Geneseo is unsatisfactory or that the rates charged therefor are excessive or that the respondent is violating any other provision of the Public Utilities Act or any provision of any order or rule of this Commission;

(5) that the 504 customers in

Geneseo of the respondent company could, if they desired, change from the service of the respondent company to the service of the Geneseo municipal plant; that these customers constitute a part of the public of this state whose convenience and necessity must be considered by this Commission; and that there is no adequate basis in the record herein for depriving these customers of the electric service furnished to them by respondent;

(6) that the respondent company has been furnishing electric service for public use in the city of Geneseo since 1912 and, under the provisions of § 55 of the Public Utilities Act of Illinois, is entitled to the benefits of a certificate of convenience and necessity for such operations; that the fact that respondent is furnishing certificated electric public utility service in the city of Geneseo creates the presumption that such service is required for public convenience and necessity; that neither the allegations in the complaint nor the evidence in the record go further in rebuttal of this presumption than to show that the complainant municipality has constructed and is operating a municipal plant capable of serving all customers, and that the respondent company, lacking permission from complainant municipality to operate in the municipality, has been ordered by the municipality to remove its poles and equipment from, and to cease furnishing electric service in, the municipality;

(7) that the complaint and record herein show insufficient grounds upon which public convenience and necessity would be served by the respondent company's discontinuing the furnishing of electric public utility service in the city of Geneseo and, therefore, the prayer of the complaint to compel the withdrawal of respondent is reduced to the status of an ouster proceeding;

(8) that there is no provision in the Public Utilities Act of Illinois empowering this Commission, upon bare proof that a public utility is operating in a municipality after expiration of its ordinance grant and after the municipality has constructed and is operating its own plant, to require the public utility to obey an ordinance passed by the municipality ordering the public utility to vacate the streets and discontinue its service;

(9) that the Illinois Northern Utilities Company, respondent herein, is now engaged in distributing electric energy for public use in the said city of Geneseo under and pursuant to the authority lawfully granted to and exercised by it since 1912, now in effect; that it is serving a substantial proportion of the population of the city of Geneseo, and that it is maintaining its properties, equipment, and distribution system, including its poles and wires, in a proper manner; that public convenience and necessity does not require the termination or modification of that part of the authority heretofore mentioned concerning the city of Geneseo; that its service in the said city is in the public interest; and that the prayer of the complainant that said respondent company be required to vacate the streets, alleys, and other public places of said city of Geneseo and remove therefrom all its poles, wires, and other appliances and to cease doing business in said city and to cease supplying the inhabitants

thereof with electric energy for heat, light, and power should be denied and the complaint dismissed.

It is therefore *ordered* by the Illinois Commerce Commission that the prayer of the city of Geneseo that Illinois Northern Utilities Company be required to vacate the streets, alleys, and other public places of said city of Geneseo and remove therefrom all its poles, wires, and other appliances and to cease doing business in said city and to cease supplying the inhabitants thereof with electric energy for heat, light, and power be, and the same is hereby, denied; and the complaint filed herein be, and the same is hereby, dismissed.

EDITOR'S NOTE.—The Commission on the same day handed down a decision in Heyworth v. Central Illinois Electric & Gas Co. Docket No. 26345, which involved the same issues, and was decided in an opinion which was, for the most part, a verbatim duplication of the above.

MONTANA BOARD OF RAILROAD COMMISSIONERS

Re Bice Brothers

[Docket No. 2855, Report and Order No. 1.]

Certificates of convenience and nceessity, § 169 — Right to a certificate — Conditions precedent to issuance.

1. The right to a certificate of convenience and necessity, granted by Commission order, is entirely separate and distinct from the certificate itself, and while one may be issued a right to a certificate, he is not entitled to the certificate until he has complied, as a condition precedent, with all of the conditions and requirements relating to the issuance thereof, p. 220.

Certificates of convenience and necessity, § 169 — Conditions precedent.

2. The granting of an application for a certificate of convenience and necessity is not the equivalent to the issuance of a certificate where compliance with Commission rules and regulations is made a condition precedent to the issuance thereof, and until such compliance occurs the case is still pending before the Commission, p. 220.

Procedure, § 32 — Application for rehearing.

3. An application for a rehearing may be made where a case is still pending before the Commission, p. 220.

Procedure, § 32 — Application for rehearing — Change in Commission membership.

4. A change in Commision membership does not prevent the Commission as now constituted from entertaining a petition for a rehearing in a proper case, p. 221.

[March 24, 1939.]

APPLICATION *for rehearing to amend previous order granting a certificate of convenience and necessity; granted.*

By the BOARD: Heretofore Bice Brothers of Laurel, Montana, filed an application with this Board for a certificate of public convenience and necessity to operate as a Class "C" motor carrier in the transportation of road and fuel oil for the Yale Refining Company of Billings, Montana, and the transportation of road oil, gasoline, and fuel oil for the Independent Refining Company of Laurel, Montana, and within the town of Laurel, Montana, to or from points tributary thereto, but within a distance not exceeding 250 miles in any direction from said town and that the certificate if granted by the Board be not transferable.

The said application of Bice Brothers was duly Docketed as No. 2855 and set for hearing and heard before this Board in Billings, Montana, on August 9, 1938. Before the hearing all parties interested in the application were duly served with notice of the hearing as provided for in § 3847.11 Rev. Code Mont. 1935. At the public hearing no one protested the granting of the application save and except the Northern Pacific Railway Company, Northern Pacific Transport Company, Railway Express Agency, and Great Northern Railway Company. These protestants during the hearing virtually withdrew their protests after hearing the evidence of applicant.

On November 16, 1938, the Board issued an order granting the applicant the right to procure a Class "C" certificate of public convenience and necessity for the purpose of transporting road and fuel oil by motor vehicle or motor vehicles for the Yale Refining Company of Billings, Montana, and the Independent Refining Company of Laurel, Montana, and within the town of Laurel, Montana, and to or from points tributary thereto, but within a distance not exceeding 250 miles in any direction from said town and that the certificate when issued would be nontransferable. In other words the order granting the right to the certificate of public convenience and necessity differs from the application in that it eliminates the transportation of gasoline by applicant to be transported for the Independent Refining Company of Laurel, Montana. The order granting the applicant the right to a certificate of public convenience and necessity as stated aforesaid was subject to a full compliance with the laws of the state of Montana and the rules and regulations of the Board of Railroad Commissioners. The applicant was duly advised by letter on December 6, 1938, that compliance with the laws of the state of Montana and the rules of the Board would have to be made within ninety days after the date of the said letter. Before the certificate could be issued to applicant the applicant had to comply with the laws of the state of Montana and rules and regulations of the Board and this compliance was a condition precedent to the issuance of the certificate by the Board.

Since the granting of the right to a certificate to applicant this Board has been reorganized in that it constitutes two Commissioners who were not members of the Board at the time the said right was granted or the application heard. However, on the 28th day of February, 1939, and within the time granted for compliance by the Board, Bice Brothers duly made an application to this Board for a rehear-

ing in the case for the purpose of amending the Board's decision and order in Docket No. 2855 which is the right given to the applicant as heretofore described so that the rights contained in the order would conform to the original application. At the time Bice Brothers presented their application for rehearing to this Board, applicant had not complied with the laws of the state of Montana and the rules and regulations of the Board, and thus the certificate of public convenience and necessity could not be issued. The Board duly set the application for rehearing to be heard before it at its offices in the Capitol building, at Helena, Montana, March 18, 1939 at 9 o'clock A.M. Registered letters containing copies of the notice of the rehearing and the date set for hearing the same were duly sent to the Northern Pacific Railway Company, Northern Pacific Transport Company, Railway Express Agency and Great Northern Railway Company. On the date specified in the notice for the hearing on the application for rehearing by Bice Brothers none of the parties named appeared and made objection and the question now presents itself as to whether or not this Board has jurisdiction to grant the application for rehearing and amend the order as prayed for by applicant.

Section 3847.7 Rev. Code Mont. 1935 provides that the Board of Railroad Commissioners, after hearing had, upon reasonable notice to the holder of any certificate or privilege thereunder, at which it shall appear that the holder violates or refuses to observe any of the Board's orders or any provision of the act, suspend or revoke any certificate or privilege issued under the provisions of the act, "but the holder of any such certificate or privilege shall have all the rights of rehearing and review, as to such order of the Board, as is provided in this act."

The foregoing is the only section of our statutes which relates to rehearings by this Board and we have no decision of our supreme court construing that part of § 3847.7, Rev. Code Mont. 1935, relating to rehearings.

Section 3847.12, Rev. Code Mont. 1935, provides that a certificate once issued shall continue in force until terminated by the Board for cause, as in the act provided, or until terminated by the owner's failure to comply with § 3847.13. This section further provides that any right, privilege, or certificate held, owned, or obtained by any motor carrier may be sold, assigned, leased, transferred, and inherited as other property only by the authorization of the Board and that the Board may issue the certificate as prayed for, or issue it for the partial exercise only of the privilege sought.

Section 3847.13, Rev. Code Mont. 1935, provides that no certificate shall be issued or remain in force unless the holder thereof shall comply with such rules and regulations of the Board as it shall adopt governing the filing of bonds, policies of insurance, or such security or agreement in such form and adequate amount and conditioned as the Board may require for: (a) the prompt payment of all compensation or fees due the state under the provisions of the act, and (b) the payment of any final judgment which may be rendered against any such motor carrier arising out of the death of or injury to any passenger or injury to

other persons or property as a result of any negligent operation of the motor vehicles or such motor carrier, with power in the Board to permit self-insurance whenever, in its opinion, the financial ability of the motor carrier warrants.

Section 3847.14, Rev. Code Mont. 1935, provides that in so far as applicable, the provisions of the statutes as to procedure before the Board, in cases involving the service of railroads in the state, including the conduct of hearing, shall apply.

[1] It is obvious from the foregoing statutes that a right to a certificate is entirely separate and distinct from the certificate itself. While one may be issued a right to a certificate by this Board, he is not entitled to the certificate until he has complied as a condition precedent to all of the conditions and requirements of the Board relating to the issuance of certificates such as filing of bonds and policies of insurance.

In this case, as heretofore noted, the applicant at the time of his application for rehearing had not fulfilled the conditions precedent to the granting of the certificate since applicant had not met the requirements of the Board or laws of the state of Montana. The application for a rehearing was made by applicant before the time had expired as designated by the Board within which the applicant must have fulfilled the requirements for the issuance of the certificate.

[2] In our opinion at the time applicant made the motion for rehearing herein, the case was not fully disposed of by the Board. The giving of a proper policy of insurance was yet to be passed upon by the Board as well as the payment of a $2 fee for the issuance of the certificate and the furnishing of a description of the equipment to be used by the applicant. In addition to the foregoing, certain highway compensation fees had to be paid. Until the applicant conformed to the aforesaid requirements no certificate would ever issue. Where this is so, it has been held that the granting of the application on the terms stated was not the equivalent of the issuance of a certificate, and the case was still pending before the Board. Reynolds v. Alexandria Motor Bus Line, 141 Va. 213, P.U.R.1925C, 828, 126 S. E. 201; Pennsylvania R. Co. v. Public Utilities Commission, 123 Ohio St. 203, P.U.R.1931C, 201, 174 N. E. 737.

[3] In accordance with the foregoing it is our opinion that until the certificate of public convenience and necessity is actually issued to the applicant the case is still pending before us and when the certificate has been actually issued the application in no manner can be construed as a pending case before the Board. Where a case is still pending before us as here, we believe that an application for a rehearing may be made. The following rule we believe states the general law on the subject:

"A party to a proceeding before a Public Utility Commission may apply to the Commission for a rehearing of the cause, either in its entirety or as to one or more of the matters determined, for the purpose of giving the Commission an opportunity to rectify any mistake made by it; and under some statutes application for a rehearing is a condition precedent to a judicial review of the order of the Com-

mission. Whether or not a rehearing should be granted is a matter within the discretion of the Commission, provided such discretion is not abused; but it should ordinarily not be allowed unless the Commission doubts the correctness of its former conclusion or new evidence is offered upon a material issue. More than one rehearing may be allowed by the Commission if deemed necessary.

"Time. Unless otherwise provided by statute, application for a rehearing by the Commission must be made within a reasonable time after the order or decision complained of becomes effective." 51 C. J. 68, 69.

In this case certainly since the applicant has made the application for a rehearing within the time allowed by us within which to comply with our rules and regulations and laws of the state of Montana the applicant is within a reasonable time in making his motion for a rehearing.

[4] The only question now remaining before us to determine is whether or not the fact that there are two new members on the Board will or will not prevent us proceeding with the application for a rehearing.

The following authorities indicate that a change in Board membership would not prevent it as now constituted from entertaining a petition for a rehearing in a proper case: Northern P. R. Co. v. Montana R. Comrs. (1935) 13 F. Supp. 529, 15 P.U.R. (N.S.) 336; Re Atchison, T. & S. F. R. Co. (Mo. 1917) P.U.R.1918A, 843; Sommers v. Midland Terminal R. Co. (Colo. 1924) P.U.R.1925C, 406; Equitable Trust Co. v. Hamilton (1919) 226 N. Y. 241, 123 N. E. 380; People ex rel. West Seneca v. Public Service Commission (1909) 130 App. Div. 335, 114 N. Y. Supp. 636.

The reading of the record of the hearing in this case convinces us that an error was made by the Board in granting the right to the certificate to the applicant and that the order granting the right to the certificate should be amended as prayed for by the applicant.

Since notice of the application was duly given to all parties who might be interested in the original application we deem that those who did not appear at the hearing on the original application need not again be served with notice of the application for a rehearing as long as we do not amend the application in a manner which will not be substantially different from the original application. Since those who did appear at the original hearing were served with a notice of the rehearing, and did not appear at the time set for the hearing on the application for rehearing, we conclude that any objection they might have to our amending the right to the certificate as prayed for by the applicant is waived and we may now proceed to amend the certificate as prayed for.

An appropriate order will be entered.

OHIO SUPREME COURT

Northwestern Ohio Natural Gas Company

v.

Public Utilities Commission of Ohio et al.

[No. 27277.]

(— Ohio St. —, 19 N. E. (2d) 648.)

Rates, § 640 — Procedure — Appeal — Application.

When a public utility files with the Public Utilities Commission an application for modification of gas rates and also an appeal from a rate-fixing ordinance, the Commission is required to dismiss the application and proceed under the appeal. Norwalk v. Public Utilities Commission (1938) 133 Ohio St. 335, 23 P.U.R.(N.S.) 293, 13 N. E. (2d) 721, approved and followed.

[February 23, 1939.]

Headnote by the COURT.

APPEAL *from Commission's order dismissing application for an increase in gas rates, and appeal to the Commission from a rate-fixing ordinance; order affirmed.*

Under the provisions of § 614–20, General Code, the appellant, the Northwestern Ohio Natural Gas Company, on July 20, 1935, filed an application before the Public Utilities Commission for an increase and modification of natural gas rates in the city of Toledo, Ohio.

While this application was pending, the council of the city of Toledo on February 8, 1937, enacted an ordinance fixing the rates for natural gas in that municipality for a period of two years beginning August 3, 1937. From this action of the city council the Northwestern Ohio Natural Gas Company perfected an appeal to the Public Utilities Commission.

Thereafter while both the application and the appeal were still pending the city of Toledo filed a motion to dismiss the application on the ground that the Commission had been divested of jurisdiction with respect thereto. This motion was granted on the authority of Norwalk v. Public Utilities Commission (1938) 133 Ohio St. 335, 23 P.U.R.(N.S.) 293, 13 N. E. (2d) 721.

APPEARANCES: McMahon & Hayward and Tyler, Wilson & Rhinefort, all of Toledo, and Eagleson & Laylin, of Columbus, for appellant; Herbert S. Duffy and Thomas J. Herbert, Attorneys General, and Willis W. Metcalf and Kenneth L. Sater, both of Columbus, for appellee Public Utili-

ties Commission; Martin S. Dodd, Director of Law, of Toledo, and John W. Bricker and Donald C. Power, both of Columbus, for appellee city of Toledo.

WEYGANDT, C. J.: The single question here presented is whether the principle announced by this court in the syllabus in the Norwalk Case, *supra,* is decisive of the instant controversy. This pronouncement reads as follows:

"Under the provisions of §§ 614–44, 3644, 3982, and 3983, General Code, a municipality has the power to enact an ordinance to fix rates for gas even after a public utility has filed an application to increase its rates under the provisions of § 614–20, General Code."

The appellant contends that the foregoing rule permits the Commission to elect whether it will proceed under the application or under the appeal. With this theory in mind the appellant insists that the facts in the Norwalk Case, *supra,* are distinguishable from those in the instant one, and that in the former case this court simply required the Commission to proceed under the appeal because of the circumstances peculiar to that situation.

The difficulty with the appellant's theory is that in the opinion in the Norwalk Case, *supra,* the court indicated its rationale in the following language:

"These powers of the municipality are subject only to review by appeal to the Public Utilities Commission in event the company does not accept the ordinance, and by the right of referendum existing in the people."

This statement was based upon the statutes and upon §§ 3, 4, and 5 of Art. XVIII of the Constitution of Ohio which confer upon municipalities a constitutional grant of broad powers with reference to public utilities. Then too, the court had in mind the fact that the statutes themselves disclose no legislative intent to deny rate-fixing powers to municipalities. Section 614–44, General Code, provides that a municipality may fix rates "at any time" within one year before the expiration of any contract, and also "at any other time authorized by law." Likewise, § 3982, General Code, specifically authorizes a municipality to regulate "from time to time" the price which such companies may charge. Therefore the ordinance took precedence, and the Commission had no alternative but to proceed under the appeal rather than under the application.

The order of the Public Utilities Commission dismissing the application of the appellant for want of jurisdiction must be affirmed.

Order affirmed.

Day, Zimmerman, Williams, Myers, Matthias, and Hart, JJ., concur.

MASSACHUSETTS SUPREME JUDICIAL COURT

Alphonso Criscuolo

v.

Department of Public Utilities et al.

(— Mass. —, 19 N. E. (2d) 708.)

Injunction, § 2 — Revocation of carrier's permit.

1. A contract motor carrier engaged solely in interstate commerce cannot enjoin the revocation of his permit on the ground that the state Commission is wholly without authority so to act, since he is asking the court to ascribe value and efficacy to the state law for the purpose of preserving to him his permit and at the same time to declare the revocation provisions of that law inoperative, p. 225.

Injunction, § 51 — Pleading — Revocation of carrier's permit.

2. Allegations of an interstate contract motor carrier, in suit to enjoin revocation of his permit, setting up the absence of evidence and stating that the Commission acted "arbitrarily, whimsically, and capriciously," relate only to the manner in which the Commission performed its designated functions under the state law, and for errors in such performance the proper remedy is by certiorari or mandamus rather than by injunction, p. 226.

Courts, § 2 — Jurisdiction — Equity.

3. Courts of equity as a general rule will not interfere to decide questions which have been committed by law to the determination of public officers, p. 226.

Injunction, § 51 — Pleading — Revocation of carrier's permit.

4. General allegations of arbitrary, whimsical, and capricious conduct on the part of the Commission in revoking an interstate contract carrier's permit are insufficient to sustain a bill in equity to enjoin such revocation, p. 226.

[March 2, 1939.]

APPEAL *from an order overruling a demurrer in suit to enjoin revocation of an interstate contract carrier's permit; reversed and decree to be entered sustaining the demurrer.*

APPEARANCES: Paul A. Dever, Attorney General, and Roger Clapp, Assistant Attorney General, for appellants; M. E. Gallagher, Jr., of Boston, for appellee.

QUA, J.: The material allegations of fact in the bill are in substance these: The plaintiff is doing business exclusively in the hauling of fresh fish for hire in interstate commerce be-

ween this commonwealth and points Connecticut and New York. The fendants are the commissioners of e Department of Public Utilities and Director of the Commercial Motor ehicles Division" of that Depart-ent. The commissioners have made order directing the revocation of e plaintiff's permit to operate on the ys of the commonwealth as an in-rstate contract carrier. G. L. [Ter. Ed.] Chap. 159B, §§ 4, 5, 6, 7, as in-erted by Stats. 1934, Chap. 264, § 1, d as amended in said §§ 6 and 7 by ats. 1936, Chap. 345, §§ 2, 3. See w Chap. 159B as revised by Stats. 938, Chap. 483. The order "has not en carried out," but if carried out it ill interfere with interstate com-erce. There "has not been any evi-nce" that the plaintiff was not "fit, le, and willing to transport property r hire," or that "his operation would any way endanger the safety and elfare of the citizens." The com-issioners' order "is posited on the sumption . . . that the Federal otor Carrier Act of 1935, Chap. 8, 9 USCA § 301 et seq. does not en-ompass, within its jurisdiction, opera-rs engaged in the transportation of h in interstate commerce." The mmissioners assumed that they ight "restrain competition with eputable' operators as an exercise of e police power reserved to the sev-al states." The commissioners "act-arbitrarily, whimsically, and capri-iously." A valuable business and roperty right of the plaintiff is en-ngered. The prayers are for in-nctive and general relief.

In our opinion the demurrer should ve been sustained.

It is true that a bill in equity will lie to restrain public officers from inflicting damage upon the business or other property of a plaintiff under color of a statute or ordinance which is unconstitutional or otherwise void and so can afford no protection. Moneyweight Scale Co. v. McBride (1908) 199 Mass. 503, 505, 506, 85 N. E. 870; Greene v. Mayor of Fitchburg (1914) 219 Mass. 121, 127, 106 N. E. 573; Shuman v. Gilbert (1918) 229 Mass. 225, 227, 118 N. E. 254, L.R.A.1918C, 135, Ann. Cas. 1918E, 793; Warr v. Collector of Taxes of Taunton (1920) 234 Mass. 279, 283, 125 N. E. 557; Morley v. Police Commissioner of Boston (1927) 261 Mass. 269, 278, 159 N. E. 41. So it has been held that equity will enjoin the enforcement of burdensome state restrictions upon interstate commerce. Western U. Teleg. Co. v. Andrews (1910) 216 U. S. 165, 54 L. ed. 430, 30 S. Ct. 286. See Terrace v. Thompson (1923) 263 U. S. 197, 214, 68 L. ed. 255, 44 S. Ct. 15.

The plaintiff contends that this case falls within the principle just stated on the ground that if the state law is construed as applying to "contract carriers" engaged exclusively in interstate commerce it encroaches upon the Federal control of that commerce and comes into conflict with the Federal Motor Carrier Act, which it is contended covers the entire field, so that the commissioners were wholly without authority to deal with the subject of revocation of the permit.

[1] We assume in the plaintiff's favor that the bill is to be construed as indicating that something still remains to be done before the process of revocation is complete. But we think that

the plaintiff's position will not stand logical analysis. There is no allegation whatever of any contemplated or probable interference by the defendants or others with the plaintiff's business beyond the bare revocation of the permit. If, as the plaintiff contends, the power to revoke permits is withdrawn from the state, so also is the power to grant them in the first instance and to continue them in force as effective instruments. The revocation of these permits is not a field of activity separate and apart from the granting of them. The plaintiff is asking the court to ascribe value and efficacy to the state law for the purpose of preserving to him what he calls his permit and at the same time to declare the revocation provisions of that law inoperative. He seeks to prevent the so-called revocation of a permit which upon his own theory was of necessity a futility from the beginning, which he does not need in order to continue his business, and of which, so far as appears, the deprivation will do him no harm. If the plaintiff is right as to the limited scope of the state law, he does not make out a case for equitable relief. If he is wrong, the commissioners clearly had the power to revoke his permit under G. L. (Ter. Ed.) Chap. 159B, § 7, as added by Stats. 1934, Chap. 264, § 1, as amended by Stats. 1936, Chap. 345, § 3, for the causes therein set forth. See now Chap. 159B as revised by Stats. 1938, Chap. 483. The plaintiff cannot escape from the dilemma. See Hart v. Folsom (1899) 70 N. H. 213, 217, 47 Atl. 603; Cofman v. Ousterhous (1918) 40 N. D. 390, 402, 168 N. W. 826, 18 A.L.R. 219; Hurley v. Commission of Fisheries (1921) 257 U. S. 223, 66 L. ed. 206, 42 S. Ct. 8[illegible] Compare Thompson v. Consolidate[illegible] Gas Utilities Corp. (1937) 300 U. [illegible] 55, 81, 81 L. ed. 510, 57 S. Ct. 364.

We need not determine the extent [illegible] which the Federal Motor Carrier A[illegible] superseded the local law. But see th[illegible] exception of vehicles used in carryin[illegible] live stock, fish, and agricultural com[illegible] modities contained in § 303 (b) (6[illegible] 49 USCA § 303 (b) (6).

[2–4] We have dealt with the on[illegible] points argued by the plaintiff. If it [illegible] suggested that a cause of action mig[illegible] possibly rest upon the allegations [illegible] the bill which do not directly relate [illegible] the boundary between Federal a[illegible] state authority, such as those settin[illegible] up the absence of evidence and tho[illegible] stating that the commissioners "a[illegible] sumed" that they might restrain co[illegible] petition with reputable operators, a[illegible] that they acted "arbitrarily, whimsic[illegible] ly, and capriciously," one answer [illegible] that those allegations relate only [illegible] the manner in which the commissio[illegible] ers performed their designated fun[illegible] tions under the state law, and for [illegible] rors in such performance the prop[illegible] remedy is by certiorari or in some i[illegible] stances by mandamus. Moneyweig[illegible] Scale Co. v. McBride (1908) 1[illegible] Mass. 503, 505, 85 N. E. 870; Morl[illegible] v. Police Commissioner of Bost[illegible] (1927) 261 Mass. 269, 279, 159 N. [illegible] 41. "It is the general rule that cou[illegible] of equity will not interfere to deci[illegible] questions which have been committ[illegible] by law to the determination of publ[illegible] officers." Mullholland v. State Ra[illegible] ing Commission (Mass. 1936) 3 [illegible] E. (2d) 773, 776. Moreover the[illegible] are no allegations which squarely ne[illegible] ative due proof before the commi[illegible] sioners of the causes for which a p[illegible]

mit might be revoked as set forth in G. L. (Ter. Ed.) Chap. 159B, § 7, as added and amended, as that section stood before the 1938 revision, and general allegations of arbitrary, whimsical, and capricious conduct are not enough. Morley v. Police Commissioner of Boston, *supra;* Arena v. Erler (Mass. 1938) 14 N. E. (2d) 110.

The order overruling the demurrer is reversed, and a decree is to be entered sustaining the demurrer.

Ordered accordingly.

NEBRASKA SUPREME COURT

Fred Drummond

v.

City of Columbus et al.

[No. 30507.]

(— Neb. —, 285 N. W. 109.)

Words and phrases — "And/or" — Criticism of symbol.

1. The symbol, or phrase, "and/or," leads to uncertainty, ambiguity, and multiplicity, and is not to be recommended, p. 231.

Municipal plants, § 27 — Referendum on acquisition — Phrase "and/or."

2. The use of the symbol, "and/or," upon the ballot confused the voters who were unable to determine definitely the effect of their votes at this special election, p. 231.

Municipal plants, § 27 — Referendum on acquisition — Statement of proposition.

3. A ballot for a special election upon public utilities should clearly state the substance of the proposition submitted. If it is stated in garbled, equivocal terms, the purpose of the election is vitiated in advance, p. 231.

Municipal plants, § 27 — Referendum on acquisition — Statement of proposition.

4. The voters at an election on public utilities are entitled to definite information which will enable them to consider, weigh, discuss, and vote upon the actual merits of the proposition. If unfounded facts are set out which obscure the issues, or mislead the voters on material questions of fact, the election will be held to be null and void, p. 231.

[April 3, 1939.]

Headnotes by the COURT.

APPEAL *from judgment sustaining referendum on municipal acquisition of utility plant; reversed.*

APPEARANCES: Lowell L. Walker, Columbus, for Henggeler; Walter, Flory & Schmid, of Columbus, for Northwestern Public Service Co.;

Emil F. Luckey, of Columbus, for Drummond; C. J. Garlow and Charles H. Sheldon, both of Columbus, and Perry, Van Pelt & Marti, of Lincoln, for city of Columbus.

Heard before Simmons, C. J., Rose, Eberly, Paine, Carter, and Messmore, JJ., and Polk, District Judge.

PAINE, J.: Fred Drummond, a resident taxpayer of the city of Columbus, brought an action to enjoin the city from issuing $250,000 of bonds under the revenue bond act. The trial court held there was no equity in the petition of plaintiff, nor in the cross-petitions of two interveners, and dismissed the action. Intervener Northwestern Public Service Company has appealed, and intervener William H. Henggeler has prosecuted a cross-appeal.

Plaintiff's petition against the city, its mayor, and the members of the city council alleged that Columbus was a city of the first class, and that on July 22, 1936, a petition for a special election was filed with the city clerk, signed by 1,198 electors, and that the city council passed a resolution calling a special election for the submission to the voters this question:

"Shall the city of Columbus, Nebraska, construct, purchase, or otherwise acquire an electric light and power distribution system, and/or transmission lines, and real and personal property needed or useful in connection therewith and pay the costs thereof by pledging and hypothecating the revenue and earnings of such distribution system and/or transmission lines to be owned by such city; and in the exercise of the authority granted by law, issue and sell revenue bonds or debentures in an amount not exce ing $250,000, for the purpose he in stated, and enter into such contra in connection therewith as may proper and necessary.

"☐ YES

"☐ NO."

On August 20, 1936, the speci election was held, and the canvassi board reported that a total of 1,2 votes were cast for the issuance such revenue bonds, and that 1,1 votes were cast against the issua of such bonds, making the majority favor of their issuance 51 votes.

It is further alleged that the pe tion to the city council was irregul in form, and signatures were illega secured, that it was insufficient, i definite, confusing, ambiguous, a drawn in such a manner as to lea to the determination of the city co cil whether a distribution syst should be constructed, purchased, otherwise acquired, and gave no a thority for calling said election; th no estimate of the cost of the constru tion of an electric light and pow plant distribution system "and/o transmission lines was filed prior the holding of the special election, provided by law, and that said speci election was not called or held as pr vided by law.

Said petition also attacks the co stitutionality of said law, and charg that Senate File No. 25 (Laws 193 Chap. 38), also known as § 18–160 Comp. St. Supp. 1935, is incomplet unconstitutional, and void.

It is also alleged that the city threa ens to issue such revenue bonds, a will unless restrained, and to let co tracts for the construction of an ele trical distribution system in said ci

and incur substantial expense for engineering and preliminary expenses, all to the irreparable damage and injury of the plaintiff and other taxpayers of the city of Columbus, for which reasons the plaintiff prays that the election may be declared null and void; that Senate File No. 25 be declared unconstitutional; that the city be enjoined from issuing or selling said revenue bonds for the purpose mentioned, or entering into any contracts for the purchase, construction, or acquiring of a distribution system.

The city of Columbus in its answer admits in brief that plaintiff is a resident taxpayer and consumer of electricity, and admits that the plaintiff prosecutes the action in behalf of himself and of others similarly situated; admits that Columbus is a city of the first class; admits that a petition was presented to the city on July 22, 1936, signed by 1,198 qualified electors, and that said number is more than 20 per cent of the votes cast at the last general city election; admits that the council passed a resolution calling for a special election, which was duly held; alleges that Senate File No. 25, which is set out at length in the answer, is a valid act, in full force and effect, and that all proceedings done in connection with Senate File No. 25 are regular and legal; admits that no estimate of costs of the construction of said distribution system was made by the city prior to the special election; denies that there is no available supply of electrical energy for the use of the city; denies that the plaintiff and other taxpayers will suffer irreparable damage and injury, and prays that plaintiff's cause of action be dismissed.

On June 1, 1937, the Northwestern Public Service Company filed its petition of intervention as allowed by the court. Said petition of intervention is too long to be abstracted herein, but alleges in effect that said corporation was operating its electric generating plant and distribution system pursuant to a franchise duly approved by the voters of the city of Columbus, which became effective February 2, 1917, for a term of fifteen years, which franchise provided that if said corporation should extend its transmission lines to other municipalities in the trade territory of Columbus, thereby making such plant a central plant, then such franchise should ipso facto extend itself for an additional period of ten years, and that, in keeping with the spirit of the franchise, the company had extended its transmission lines to other municipalities and rural residents, and thereby said franchise did by its terms extend to February 2, 1942; that its transmission lines reach all parts of the city of Columbus and rural districts and small towns in adjacent territory; that it has constantly lowered its rates and improved its service, and that such considerable investments have been made by such corporation in reliance upon the applicable statutes of the state of Nebraska, and upon the Constitution of the state of Nebraska, and upon the Constitution of the United States, in the assurance that said corporation would at all times be protected against unlawful competition, unlawful acts, contracts, or competition not duly authorized by the laws of the state of Nebraska, which might destroy or render useless the property and rights of the intervener corpora-

tion. Intervener further alleges that it has invested in excess of $1,250,000 in the Columbus division, of which $800,000 is allocated to the city of Columbus alone, and that if the city should construct a competing distribution system it would greatly depreciate, if not destroy, a part or all of said system.

Intervener further alleges that plaintiff's petition was not filed in good faith, but that the suit was collusively instituted, and charges that the special election was illegal and void for the reason that signatures were secured to the petition therefor by fraud and misrepresentation; that the preamble of said petition for special election contained false and misleading statements, one being that an ample supply of electrical energy will be available, whereas there was not then, and is not now, an ample supply of "firm" power from any source; that said preamble indicated that electricity would be sold at approximate cost, and at less than the present wholesale cost; that the preamble stated that the current would be available January 1, 1937, that said petition for the special election represented that a complete distribution system for the city of Columbus and urban patrons, comparable with the present system, could be constructed for the sum of $250,000, which was untrue.

The intervener prays that the election held August 20, 1936, be declared null and void; that the city be enjoined from issuing any revenue bonds, or incurring any expense, or entering into any contract for the purchase, construction, or otherwise acquiring of an electric distribution system for said city.

On June 11, 1937, William H. Henggeler, a resident taxpayer of the city of Columbus, also filed his petition of intervention, in which he charges that the plaintiff, Fred Drummond, was and is favorable to the construction of such a system, and is not contesting the same in good faith, or with the desire to prevail, and that there is collusion between the plaintiff and the city, and the same amounts to a constructive fraud upon the court and upon the city, its taxpayers, and users of electricity in the city, and that a decision therein would not be final or determinative of the matters at issue.

Said intervener Henggeler alleges that the petition of intervention of the Northwestern Public Service Company fails to allege the foregoing deficiencies and collusive institution of the suit between the plaintiff Drummond and the city, and therefore prays that the petition of the plaintiff and the petition of intervener Northwestern Public Service Company both be denied, and that the action be dismissed.

On July 3, 1937, the city of Columbus filed an answer to the petition of intervention of William H. Henggeler, in which it admits that the intervener is an elector, and a consumer of electricity in Columbus, and that no official estimate of the cost of the construction of the distribution system or transmission lines was made prior to the special election, but alleges that an unofficial estimate was made; admits that the mayor and council appointed special counsel for the city to take steps to establish the validity of the act under which the city is proceeding, but denies all other allegations of said intervener Henggeler's petition.

On July 22, 1937, the said city filed its answer to the petition of intervener Northwestern Public Service Company, and admits that it operates an electric light and power distribution system in Columbus, and has extended its lines to outside territory, making the city of Columbus a central plant; admits that the council of the city of Columbus granted a 10-year extension of its franchise, but denies that the same is valid, and alleges that its contract with the city of Columbus for furnishing street lighting, etc., expires October 1, 1937; and denies all other allegations therein.

In the trial of the case the plaintiff did not testify, and only eight witnesses testified in the case. Joseph F. Stanzel, city clerk of Columbus, identified a large number of records for introduction as exhibits.

The intervener Henggeler called his witness attorney Emil F. Luckey, who prepared the petition for the plaintiff.

The intervener Northwestern Public Service Company called C. J. Strike of Huron, South Dakota, its president and general manager, who testified that it was incorporated in Delaware in 1923, and does business in Nebraska and South Dakota. He testified that the city of Columbus had never made any effort to exercise its option to purchase said plant; that his company now serves Richland, Duncan, Silver Creek, Monroe, Platte Center, and Tarnov, and also some ninety rural customers; that the Columbus division of his company has an investment of $1,250,000, and that of this $845,000 is properly chargeable to service in the city of Columbus. He also testified that the stock of the Northwestern Public Service Company was owned by the Middle West Utilities Company, with headquarters in Chicago. James L. Rich, a former city clerk, and E. K. Albert, its electrical engineer, also testified for the Northwestern Public Service Company.

The city of Columbus called only three witnesses, Dewey DeBoer, chief electrical engineer of the Loup Valley Public Power District, Fred C. Albert, supervising civil engineer of the power district, and Robert Fulton, who has been chief electrical engineer of the Sutherland project.

The trial of the case began on October 18, and when the parties rested on October 21, 1937, counsel were given time to furnish written briefs, and the matter was taken under advisement by the court until March 29, 1938, when the trial court entered its decree, finding generally in favor of the city, and finding there was no equity in the petition of plaintiff, nor in the cross-petitions of interveners, and therefore dismissed the same. Motions for new trial were filed by the two interveners, as well as by the plaintiff, which were each overruled, and from these adverse rulings appeals were taken to this court.

[1–4] Our attention is first challenged to the use of the expression, "and/or," which made it impossible for the voters, in reading the ballot, to determine whether they were voting to authorize the city of Columbus to construct, purchase, or otherwise acquire an electric light and power distribution system, or, on the other hand, to construct, purchase, or otherwise acquire something entirely different, to wit, a transmission system to connect with some source of firm

power. This term, "and/or," left the choice for the officers to make after the dual proposition should be adopted by the voters at the election. The use of this expression seems to be increasing. "It has been said that the meaning may be clear, implying the intention either that effect shall be given to both the conjunctive 'and' and the disjunctive 'or,' or else that the one word or the other may be taken accordingly as the one or the other will best effect the purpose of the parties as gathered from the instrument taken as a whole." 3 C. J. S. 1069.

An early case (February 8, 1855) in which "and/or" appears was Cuthbert v. Cumming, 156 Eng. Rep. 668, involving an agreement by charter party to load on board a vessel at Trinidad a full and complete cargo of sugar, molasses, "and/or" other lawful produce for Liverpool. The vessel was loaded with sugar in hogsheads and molasses in puncheons, but the vessel might have been able to hold additional cargo. Baron Alderson held that the "and/or" left it open in every way to fill the vessel with a complete cargo of sugar and molasses, or a complete cargo of other lawful produce.

In Bell v. Wayne United Gas Co. (1935) 116 W. Va. 280, 298, 181 S. E. 609, 618, it was said: "The involvements of the contract are accentuated by the frequent use of the baffling symbol 'and/or'—a disingenuous modernistic hybrid, inept and irritating." (Dissenting opinion of Maxwell, J.)

The American Bar Association Journal for July, 1932, published an editorial against the use of this expression, and received so many letters that in its September, 1932, issue a symposium was published, giving opinions from many lawyers, judges, decisions of courts, and references to law magazine articles, and the majority view was against its use. See, also, Kornbrodt v. Equitable Trust Co. (1931) 137 Or. 386, 392, 2 P. (2d) 236, 3 P. (2d) 127.

In the "and/or" annotation in 118 A.L.R. 1367, we find its use is condemned in statutes, ordinances, and legislative acts. Its use in pleadings and instructions to jury is also criticized. Amidst almost universal condemnation, a very few decisions and articles in two law magazines appear to uphold its use. The great majority of courts do all in their power to discourage its use, and it has been criticized by one court in this language: "It is manifest that we are confronted with the task of first construing 'and/or' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents." Employers' Mut. Liability Insurance Co. v. Tollefsen (1935) 219 Wis. 434, 263 N. W. 376, 377.

The use of this symbol, "and/or," upon the ballot prepared in the case at bar, led to the confusion of the voters, who were absolutely unable to determine definitely what they were voting for or against.

In the petition circulated by the citizens' committee, which was signed by the voters, one of the inducements offered to the voters reads as follows: "An ample supply of electrical energy will be available to said city at approx-

imate cost upon the completion of the Hydroelectric Project of the Loup River Public Power District, of Columbus, Nebraska, about January 1, 1937." Considerable evidence was brought out as to when an ample supply of electricity would be available. It is argued in the brief that the one who drew the petition had never consulted an engineer, and that there was no ample supply of electricity available to the city, even a year later than the date mentioned in the preamble, upon which the voters relied in casting their votes, and at the time of trial it was still clear from the evidence that there would not be an ample supply of "firm" electrical energy available without stand-by steam plants.

In the ballot submitted to the voters, it provided that the cost would not exceed $250,000, and the evidence clearly indicates that the present distribution system of the city of Columbus could not be purchased, or one like it built, for anything like $250,000, which amount was held out to the voters as the limit of the expense they were asked to authorize.

In the preamble to the petition which was circulated by the citizen's committee to get the signatures of the voters, it represented that electricity would be available to the city on January 1, 1937, and also that it would be furnished to the city at approximate cost. This implied to the voters that there would be a saving from the rates which they were paying under the present system, or at least that the rates would be as favorable as the then existing rates. There is, however, in the evidence no indication of what the cost of electricity will be to the users of electricity if the city purchases or constructs the utility, as authorized by the vote of the electors.

We will now take up a very few of the decisions bearing upon the points at issue in the case at bar. In Board of Education v. Powers (1935) 142 Kan. 664, 51 P. (2d) 421, the proposition submitted to the school electors was, whether there should be issued bonds in the amount of $198,500 to erect a school building. An elector, who saw the election proclamation, read it, went to the polls and voted, had no means of knowing that it was proposed to erect a building which, when erected and equipped, would cost over $390,000, the balance of the sum to be obtained from the United States government. It was held that the proposition was obscurely stated, and the electors may have been misled, for had the electors known that a building of $390,000 was to be erected they would realize at once that there would be increased cost of maintenance, supervision, and upkeep, and that it would be a much more expensive establishment than some voters might have thought necessary or advisable, and might have voted against the issuance of the bonds for the amount that the school district was to furnish. The argument that the excess cost was to be paid through a Federal agency, and would not increase the burden of the taxpayers, is not entirely true, but if it were true the taxpayer was entitled to know it when he was legally advised that there was to be an election. This decision reaffirms the old case of Leavenworth v. Wilson (1904) 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367, which held that the ballot should clearly state the substance of the proposition submitted, and if the proposition on the ballot is

stated in equivocal terms the purpose of the election is vitiated in advance.

"If there be two objects, and . . . they are submitted together, it is very clear that the voter cannot vote for one and against the other. He must vote against both, whereby he may defeat one, the success of which he desires, or he must vote for both, whereby he may cause the success of one which he desires to be defeated. If he fails to vote he may thus aid in causing the defeat of his favorite measure, and the adoption of the one he opposes. He has thus no liberty of choice." Denver v. Hayes (1900) 28 Colo. 110, 118, 63 Pac. 311, 314.

In Mann v. Artesia (1938) 42 N. M. 224, 76 P. (2d) 941, the notice of election provided that bonds for the construction of a municipal hospital would be payable not more than thirty years nor less than twenty years after the date of issue. In New Mexico, bonds cannot be lawfully issued by municipalities with a longer maturity than twenty years. It may have influenced some voters to support the issue because they thought the repayment of the bonds would be postponed until the next generation, and therefore the proposal as to maturities, as submitted on the ballot, was calculated to mislead the voters. The order of the trial court sustaining the demurrer was reversed.

In Stern v. Fargo (1909) 18 N. D. 289, 122 N. W. 403, 26 L.R.A. (N.S.) 665, it is said that the object of the notice of an election is to give the voters and taxpayers such information as will enable them to consider, weigh, and discuss the merits of the proposition, and to combine several distinct and independent purposes in one proposition, without specifying the amount which is to be devoted to each is a clear evasion of the law, and, if permitted, would fritter away the safeguards thrown around such transactions.

In the case at bar, the ballot was designed to secure the assent of those voters who favored the purchase of the elecric light and power distribution system already in use for many years, an electrical plant costing in better times around $800,000, which some of the voters may have believed could be secured for an amount not exceeding the $250,000 mentioned on the ballot, and, on the other hand, the ballot was designed to secure the favorable votes of all voters who might favor the construction of an entirely new municipal electric light and power system to compete with the one already established, and would also secure the "yes" votes of those voters who were not interested in either of these two things, but in an entirely separate proposition, the construction of a transmission line to some government hydro-project, which would furnish the city firm power at approximate cost, as stated to the voters.

These several propositions were submitted on the ballot without giving the voters a chance to vote for one as against the other. In a similar situation, it was asked by the Kansas court: "Did the electors vote to purchase or to construct transportation lines? Did some of them vote to purchase and did others vote to construct these lines? Frankly we do not know. . . . It cannot, of course, be seriously contended that the methods of acquiring distribution lines by 'purchase' and by 'building and construction,' are any-

thing other than two separate and distinct methods of acquisition. The method of acquisition would be one or the other and not both." This Kansas action was instituted before any bonds were issued. There was no unnecessary delay. The petition stated a cause of action. The appeal was perfected immediately. The order of the trial court, sustaining the demurrer and dismissing the petition, was reversed. Kansas Utilities Co. v. Paola (1938) 148 Kan. 267, 80 P. (2d) 1084, 1088. See, also, Julson v. Sioux Falls (1925) 48 S. D. 452, 205 N. W. 43; Eastern Shore Pub. Service Co. v. Seaford (Del. Ch. 1936) 187 Atl. 115.

The question of the accuracy and sufficiency of the statements made in the preamble of the petition which the voters were asked to sign, as well as the form and contents of the ballot submitted to the electors at the special election, have all been fairly raised and carefully considered. In our opinion, these instruments did not fully, clearly, and frankly disclose to the electors just what the city officials proposed to do, and action has been brought for relief in this case. In our opinion, the petition and the ballot presented statements of facts which were unfounded, and the voters relied upon these statements in casting their ballots. The propositions presented to the voters were multiple and obscure, and were not fairly and candidly stated, and voters would be confused upon the propositions submitted.

Many courts have held that a proposition may be submitted to purchase or erect a public utility, and that this may be considered as one proposition, but in the case at bar there was more than that simple question submitted to the voters, and in our opinion the special election was so defective in these particulars that it was null and void. Having reached this conclusion, it is not necessary in this action to pass upon the constitutionality of § 18–1601, Comp. St. Supp. 1935. The judgment of the trial court is reversed.

MISSOURI PUBLIC SERVICE COMMISSION

M. H. Budd et al.

v.

Southwestern Bell Telephone Company

[Case No. 9541.]

Service, § 465 — Telephones — Restriction on public use — Rule.

A rule providing that customer telephone service as distinguished from public and semipublic telephone service is furnished only for use by the customer, his family, his guests, employees, or business associates, or persons residing in the customer's household, except as the use of the service may be extended to joint users, should be published and used as a guide to the

users of the service and to the utility furnishing it, to prevent the abuse of the service by the users or by persons who may casually or regularly call at a place of business and desire the use of the telephone, but the rule should be looked upon as an administrative rule and should not be abused by the public or arbitrarily enforced by the utility to 100 per cent.

[March 20, 1939.]

COMPLAINT *by telephone users against enforcement of rules and regulations governing use of telephone service at gas service stations; dismissed without prejudice.*

By the COMMISSION: This case is before the Commission upon the complaint of certain users of telephone service furnished by the Southwestern Bell Telephone Company in Springfield, Missouri, against said telephone company, because of insistence by the telephone company that it be permitted to enforce certain rules and regulations governing the use of the telephone service by the complainants and the type and location of the telephone instrument through which the service would be furnished.

The business in which the complainants are engaged is commonly known as gas service stations, or vendors of gasoline, oils, batteries, and automobile accessories.

The complainants state they have for sometime in the past been users of the class of service herein named, and until recently had what is designated as ordinary straight-line business telephone service, being regular subscribers of that class of service. Their complaint indicates that of late the defendant has become actively engaged in the enforcement of a strict compliance with a rule which restricts the parties to whom the service is available. The rule is filed in the defendant's schedule with this Commission, and reads as follows:

"Customer telephone service, as distinguished from public and semipublic telephone service, is furnished only for use by the customer, his family, his guests, employees, or business associates, or persons residing in the customer's household, except as the use of the service may be extended to joint users. The telephone company has the right to refuse to install customer service or to permit such service to remain on premises of a public or semipublic character when the instrument is so located that the public in general or patrons of the customer may make use of the service. At such locations, however, customer service may be installed, provided the instrument is so located that it is not accessible for public use."

The complainants claim that in the enforcement of the aforesaid rule the defendant has required the telephone instruments in their places of business be installed in air compressor rooms, storage rooms, grease rooms, and supply closets with the doors to such places closed at all times, and in many instances in places considerably removed from the places where customers are served and in places not connected directly with the office of the station or any room where the complainants serve their customers.

In their prayer the complainants ask the Commission to direct the defendant to install straight-line business service in each place of the complainants' business, or that the Commission enter its order declaring the aforesaid rule unreasonable and unjust and revise it so as to provide that any place not visible or frequented by the general public is a location of the telephone instrument that is not accessible for public use and a compliance with said regulation, or that the Commission enter its order directing that the defendant place all business establishments frequented by the public in the same class and subject to the same rates, rules, and regulations and that said defendant cease and desist from its practice of arbitrarily applying said rules and regulations, and in discriminating between subscribers of the same class of service.

In response to the complaint the defendant takes the position the rule is reasonable and is indispensable relating to the rates charged for flat rate service in that exchange area. It claims that this rule is a factor governing the average calling rate upon which all flat rates are based, and is a factor in governing the production of revenues necessary to be obtained under the rate schedules incorporating the flat rate service. It contends the abolition of the rule would result in discrimination against the great majority of the respondent's flat rate customers and in a diminution of the value of the service to a great majority of customers of all classes. It denies the complainants have been denied telephone service, but does state that semipublic telephone service has been repeatedly offered to this class of customers, and recently measured service which eliminates any result of the unauthorized use of flat rate service, which it contends the complainants herein have allowed in connection with the use of the service furnished them by the defendant.

A hearing was held in this matter in Springfield, Missouri, and all parties interested were given an opportunity to be heard. The case was submitted upon the record.

The defendant contends that since the conclusion of the hearing in this case it has worked with the complainants and has installed for them or restored telephone service of the character and kind that is satisfactory to them. A letter received from the defendant dated February 20, 1939, submits a tabulation showing the following figures:

SPRINGFIELD, MISSOURI, EXCHANGE

Classification of Telephone Service Furnished Filling Stations

Class of Service	Feb. 1, 1938	Oct. 1, 1938	Jan. 9, 1939	Feb. 20, 1939
Flat rate business—One-party line ..	6	..	1	1
Flat rate business—One-party line supplemented with a public telephone	19	17	18	18
Semipublic—one-party line	56	65	64	72
Total filling stations having telephone service	81	82	83	91

On March 1, 1939, the Commission's telephone engineer called upon the attorneys for the complainants and discussed the situation as it now exists. He reports that counsel for the complainants state the service the complainants are now receiving is satisfactory to them, and if so continued there will be no cause for further action in this case. They desire that

the Commission retain jurisdiction of the issues involved in this case, or require that the defendant continue to furnish the service in conformity with the type of service it is now furnishing the complainants, or the type of service they may desire in conformity with the rules and regulations as are now being practiced by the defendant at this time. The engineer reports that counsel for the complainants agree that if the service as now furnished is continued to be furnished this case may be dismissed, it being understood, should there be any unreasonable violation of the present practice by the defendant, and such violation cannot be amicably adjusted, they may again complain to this Commission.

The letter of February 20, 1939, received from the defendant does not indicate that the defendant is entirely satisfied with the conditions under which it is now furnishing service to the complainants, but it is willing to not attempt to enforce a more strict compliance with the requirements under which it furnishes the service than it is now securing from the complainants.

It may be well before concluding this record to express in a general way the purpose of the rule and the views of the Commission as to how it should be enforced and administered. It does not appear desirable to the Commission, and it is of the opinion that neither the complainants nor the defendant would desire a strict enforcement of this rule in connection with the rendition of telephone service to any class of customers. It is common knowledge that many customers are receiving straight-line business telephone service throughout the state in offices, stores, and other places wh[ere] an occasional use of the telephone [is] permitted and desirable by persons w[ho] are not entitled to the use of it u[nd]er the strict interpretation of th[e] rule.

On the other hand, the rule or a sim[ilar] lar rule, should be published and use[d] as a guide to the users of the servi[ce] and to the utility furnishing it to pr[e]vent the abuse of the service by th[e] users or by persons who may casuall[y] or regularly call at a place of busine[ss] and desire the use of the telephon[e]. There is more inclination on the pa[rt] of nonsubscribers of the service t[o] avail themselves of the use of th[e] telephone service in some types o[f] business places than in others. Thi[s] is particularly true in the type of cus[-] tomers represented in this complain[t] such as filling stations. Filling sta[-] tions are generally scattered at con[-] venient places throughout the city area. If use of the telephone servic[e] is permitted with the telephone instru[-] ment located at a place where it merel[y] requires that the user stop in and op[-] erate the instrument without restraint abuse in the use of the service wil[l] too often be the result. Many resi[-] dent customers in the neighborhood o[f] passersby may make it their regular mode of securing telephone service. It is not reasonable to expect that such unreasonable use of the service should be granted. In fact such users of the service may become an annoyance to the business man in whose place of business is located a telephone instrument, and to avoid offending customers or prospective customers, he hesitates to restrict the use of the telephone. In that instance the enforcement of the rule on the part of the util-

y is beneficial to the customer. There e many angles and ramifications that ay be mentioned in the administra- on of this rule, but it is not necessary o discuss that further.

The rule itself should be looked up- n as an administrative rule and should ot be abused by the public or arbi- rarily enforced by the utility to 100 er cent. If the complainants or any sers of the service are of the opin- on at any time that the defendant is urnishing the service in an unreason- ble or arbitrary manner they may ake complaint to the Commission nd the conditions surrounding such complaint will be looked into formally or informally as the conditions may warrant.

From the record as it now appears, the Commission is of the opinion this case should be dismissed without prejudice.

It is, therefore

Ordered: 1. That this case be and is hereby dismissed without prejudice.

Ordered: 2. That this order shall take effect ten days from this date and that the secretary of this Commission shall serve certified copies of this order upon all interested parties.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Re South Pittsburgh Water Company et al.

[Securities Certificates Nos. 83, 84, Application Nos. 56667–56670.]

Accounting, § 7.6 — Payment for minority stock.

1. An amount deposited by a purchasing corporation with a bank to pay for outstanding minority shares of the capital stock of a purchased company which has leased its properties should be debited to surplus account, instead of to fixed capital account, when the value placed on the minority stock has been determined by capitalizing the present rental income of the stock and therefore bears no close relation to the cost of fixed capital, p. 242.

Valuation, § 1 — Minority stock — Capitalization basis.

2. A value of $25 a share placed on seven outstanding minority shares of stock in a corporation selling its property and franchises to another corporation appeared to be fair to the owners thereof when determined by capitalizing at 2½ per cent the present rental income of the stock (the company's property being under long time lease), since by investing $25 at only 2½ per cent annual interest they would receive the same income as at present, p. 242.

Consolidation, merger, and sale, § 23 — Grounds for approval — Aid to refinancing — Simplification of corporate structures — Operating economy.

3. Proposed mergers of public utility corporations should be approved when (1) the mergers are necessary to the merging company's refinancing plan, (2) the merger arrangements are unobjectionable except for a minor matter of accounting, (3) the mergers will simplify corporate structure, will

integrate companies that logically form one service unit, and will effect some minor economies, (4) the properties of the companies form a single operating unit, all being controlled by one holding company, and (5) the service rates of the companies are identical, p. 243.

Security issues, § 49 — Earnings factor — Fixed charges on new bonds.

4. Corporate earnings which, after deduction for depreciation, are 2.7 times proposed fixed charges on new bonds constitute a satisfactory ratio, p. 245.

Accounting, § 21 — Unamortized discount and expense — Amortization.

5. Amortization of unamortized discount and expense on presently outstanding bonds over what would be the remaining life of such bonds if they were not to be redeemed is a satisfactory accounting treatment, upon the redemption of such bonds and the issuance of new bonds in a refinancing plan, p. 245.

Security issues, § 87 — Overcapitalization — Factors affecting objection.

6. A proposed overcapitalization in connection with a refinancing plan was held not to be a bar to the registration of securities certificates where the utility's present and proposed capitalization was and would be represented by common capital stock all owned by a holding company, and where, to correct the overcapitalization, the utility had formally stipulated that if the original cost basis should eventually be found to be less than the amount recorded on the books, the utility would reduce the par value of common stock or its surplus account or both, or adopt a program for amortization of the difference, or provide for such difference by a combination of the above methods, p. 245.

Security issues, § 44 — Grounds for approval.

7. Authority to issue securities was granted where the utility had committed itself to a satisfactory program for further reduction of bonds to property ratio, where refinancing would reduce annual fixed charges, and where the refinancing would effect a reduction in the amount of outstanding obligations, p. 246.

Consolidation, merger, and sale, § 25 — Security issues — Objections by municipality — Prospective condemnation of property.

8. Objections by a municipality to a merger of water utility companies and issuance of securities, on the ground that the municipality contemplates legislation looking toward condemnation of the properties and that authority should be refused unless approval will result in an immediate reduction of rates, should be disregarded without prejudice to future action when it appears that a pending rate case is directed against the larger of the companies involved in the merger, which company will survive the merger, that acquisition of the smaller companies will not affect the rates charged by the larger company, and that the merger will not adversely affect or in any way hinder the municipality either in condemning the properties or in participating in the rate case, p. 246.

[March 22, 1939.]

APPLICATIONS *for authority to issue securities, to sell and to acquire water utility franchises and property, and to exercise rights in designated territory; granted subject to conditions.*

By the COMMISSION: The matters involved in three of these proceedings (A. 56667, A. 56668, A. 56669) are components of one project—the acquisition by South Pittsburgh Water Company of the physical property and franchises of St. Clair Water Company, Chartiers Valley Water Company, and Whitaker Water Company. South Pittsburgh Water Company in effect is the only operating company in the territory. The matters involved in the remaining three proceedings are necessarily related to the merger proceedings for the reason that South Pittsburgh Water Company has evolved a refinancing program which cannot be properly devolved without a merger of the four companies so that all the property and franchises of the four companies may be brought directly under an indenture of mortgage.

All the property and franchises of the St. Clair Water Company are leased to the Chartiers Company under a 999-year lease, and all the property and franchises of the Chartiers Company are in turn leased, under a 99-year lease from July 30, 1896, to South Pittsburgh Water Company. The property and franchises of the Whitaker Company are not leased to South Pittsburgh Water Company, but are operated by employees of South Pittsburgh Water Company.

All the outstanding capital stock of the St. Clair Company is owned by the Chartiers Company, and all the outstanding capital stock of the Chartiers Company, except for seven shares, is owned by South Pittsburgh Water Company.

The St. Clair Company has charter and franchise rights in what had been the boroughs of Beltzhoover and Knoxville, Allegheny county, but which are now parts of the city of Pittsburgh; in what had been the boroughs of Chartiers and Mansfield, Allegheny county, but which are now the borough of Carnegie; and in what had been the township of Lower St. Clair, Allegheny county, but which is now partly in the city of Pittsburgh, and partly in the borough of Mt. Oliver. The Chartiers Company has charter and franchise rights in the district lying south and west of the Ohio and Monongahela rivers within the county of Allegheny and outside the limits of the city of Pittsburgh, as such limits were fixed on July 30, 1896. The Whitaker Company has charter and franchise rights in the borough of Whitaker, Allegheny county.

The St. Clair Company proposes to sell all its property and franchises to the Chartiers Company in consideration for $1 and the assumption of all its debts, liabilities, and obligations. The St. Clair Company has no assets "other than a reversionary interest in its franchises and property, which are leased to Chartiers Valley Water Company for a term of 999 years from February 15, 1897." Nor does the St. Clair Company have any liabilities. In view of this, the Chartiers Company will simply make a memorandum entry in its accounts for the acquisition of the property and franchises of the St. Clair Company, the entry to be simply a debit and a credit of $1 to Fixed Capital Account.

The Chartiers Company proposes to sell all its property and franchises to the South Pittsburgh Company in consideration of the cancellation by the latter of 19,993 shares of the capital

stock of the Chartiers Company; the payment to the Chartiers Company of $25 in respect of each share of stock (seven all told) not owned by the South Pittsburgh Company; and the assumption by the South Pittsburgh Company of all the liabilities and obligations of the Chartiers Company.

The Chartiers Company had the following assets and liabilities as of November 30, 1938:

Assets	
1. Property, plant, and equipment, including intangibles	$2,031,007.08
2. Cash	27.43
3. Accounts receivable	1.55
4. Unmatured rents receivable (from South Pittsburgh Water Company)	6,250.00
5. Total assets	$2,037,286.06
Liabilities	
6. Common stock, 20,000 shares, par value $50 per share	$1,000,000.00
7. Accounts payable—South Pittsburgh Water Company	1,000,000.00
8. Deferred credits	4.37
9. Corporate surplus unappropriated	37,281.69
10. Total liabilities	$2,037,286.06

Since, however, the South Pittsburgh Company has already recorded its investment in the Chartiers Company in Fixed Capital Account, and since all the assets and liabilities of the Chartiers Company, except the minor items Nos. 2, 3, and 8, are receivable from and owing to the South Pittsburgh Company, that company will simply make the following entries to record the acquisition of the property and franchises of the Chartiers Company:

	Debit	Credit
1. Fixed capital	$1.00	
2. Cash	27.43	
3. Accounts receivable	1.55	
4. Fixed capital		$25.61
5. Deferred credits		4.37
6. Fixed capital	175.00	
7. Cash		175.00

The credit of $25.61 to Fixed Capital (Item No. 4) is simply a balancing entry, being the excess of the sum of debits Nos. 1–3 over credit No. 5.

[1, 2] The debit of $175 to Fixed Capital Account and the credit of a like amount to Cash Account (Items Nos. 6 and 7) are to record the South Pittsburgh Company's deposit of $175 with a bank for payment for the outstanding seven minority shares of the capital stock of the Chartiers Company. As the value of $25 a share placed on the minority stock apparently was determined by capitalizing at 2½ per cent the present rental income of the stock, and therefore bears no close relation to the cost of Fixed Capital, the $175 should be debited to Surplus Account instead of to Fixed Capital Account.

The value of $25 a share placed on the seven outstanding minority shares appears to be fair to the owners thereof, since by investing $25 at only 2½ per cent annual interest they will receive the same income that they now receive.

The Whitaker Company proposes to sell all its assets and liabilities to the South Pittsburgh Company for a cash consideration of $12,898.47, less the amount, if any, by which the liabilities of the Whitaker Company on the date of sale exceed the then current assets of the Whitaker Company; the South Pittsburgh Company also to assume all the debts and obligations of the Whitaker Company. In other words, the consideration will be the assumption of all the liabilities of the Whitaker Company plus an amount in cash equal to the excess of the sum of all assets (including Fixed Capital at depreciated original cost) over the sum of all liabilities, excluding capital

stock as a liability. The South Pittsburgh Company will, of course, receive back, as a liquidating dividend, the cash consideration. The assets and the liabilities were as follows as at November 30, 1938:

Assets		
Fixed capital (stated to be actual original cost)		$14,915.71
Less depreciation reserve (stated to be adequate)		2,017.24
Depreciated original cost of Fixed Capital		$12,898.47
Miscellaneous investments		12.00
Cash		3,456.43
Accounts receivable—consumers —		3,838.30
Other accounts receivable		3.25
Unbilled water service accrued		214.00
Total assets		$20,422.45
Liabilities		
Advances from American Water Works and Electric Company, Inc.	$8,001.50	
Accounts payable to South Pittsburgh Water Co.	304.75	
Unmatured interest accrued on unfunded debt	165.92	
Taxes accrued	869.22	
Service deposits	20.00	
Deferred credits	1.72	
Total liabilities		9,363.11
Cash consideration		$11,059.34

The South Pittsburgh Company will record these assets and liabilities in its accounts at the above figures, with a credit of $11,059.34 to Cash Account (subject, of course, to changes in the ordinary course of business between November 30, 1938, and the date of sale). Upon the liquidation of the Whitaker Company, the South Pittsburgh Company will receive back the $11,059.34 cash, and will debit Cash Account therefor, with a credit of $5,046.67 to account Investment in Stock of Whitaker Water Company and a credit of $6,012.67 to Dividends on Investment Securities.

[3] The proposed mergers will be approved for the following reasons:

1. The mergers are necessary to the South Pittsburgh Company's refinancing plan because the intending purchasers of the South Pittsburgh Company's new bonds require that the properties and franchises of the St. Clair, Chartiers, and Whitaker companies be placed directly under the indenture of mortgage.

2. The merger arrangements, including the accounting features, are unobjectionable except for the minor matter of accounting for the $175 cash to be paid for the seven minority shares of the capital stock of the Chartiers Company.

3. The merger will simplify corporate structure, will integrate companies that logically form one service unit, and will effect some minor economies.

4. The properties of the four companies form a single operating unit. The three subsidiary companies could not operate separately; and all four companies are controlled by one holding company.

5. The service rates of the companies are identical.

Following the merger, South Pittsburgh Water Company (hereinafter sometimes called the utility), proposes to redeem its presently outstanding funded debt, which is as follows:

Issue	Call Price	Amount Outstanding
First mortgage 50-year gold bond, 5%, due August 1, 1955	100–	$3,348,000
First lien and refunding mortgage 5% gold bonds:		
Series A, due January 1, 1960	102–	1,190,000
Series B, due January 1, 1960	105–	1,850,000
		$6,388,000

The utility also proposes to repay $1,719,576.68 of open-account indebtedness owed to American Water Works and Electric Company, Inc., the parent of the utility. Interest on such open-account indebtedness has been paid currently by the utility at the rate of 5 per cent per annum. All the funds advanced on open account by the parent company to the utility and its leased subsidiaries were used for the partial financing of net plant additions and betterments from January 1, 1930, to November 30, 1938, totaling $2,636,227.61.

To finance this program of retiring $6,388,000 of 5 per cent bonds and $1,719,576.68 of 5 per cent open-account indebtedness, the utility proposes to issue $7,500,000 principal amount of its first mortgage bonds, series A, 3¾ per cent, due March 1, 1964, and 55,000 shares of its common stock of the par value of $10 per share. The new bonds will be sold, through a broker, to a group of fiduciary institutions, which will purchase the bonds on or before March 31, 1939, on a 3.5 per cent basis to maturity (approximately 104.14 per cent of the principal amount), plus accrued interest from March 1, 1939, to the date of sale. The 55,000 shares of common stock will be sold to American Water Works and Electric Company, Inc., the parent of the utility, at a price of $10 per share.

The gross proceeds from the sale of the bonds will amount to $7,810,500 (exclusive of accrued interest) and the proceeds from the sale of the stock will be $550,000. The disposition of the proceeds of both sales, $8,360,500, is shown below:

Redemption of 5% 50-year gold bonds @ 100	$3,348,000.00
Redemption of series A 5% bonds @ 102	1,213,800.00
Redemption of series B 5% bonds @ 105	1,942,500.00
Repayment of open-account indebtedness owed to parent	1,719,576.68
Broker's commission ½ of 1%	37,500.00
Duplicate interest	46,300.00
Expenses to be incurred in connection with the issue of new bonds and common stock	44,900.00
To partly reimburse the treasury for expenditures for net plant additions and betterments made between January 1, 1930, and November 30, 1938, in the amount of $2,636,227.61	7,923.32
	$8,360,500.00

The refinancing will reduce the utility's annual fixed charges by an amount in excess of $100,000. This saving, however, will be offset somewhat by unstated increases in state and Federal income taxes because of the increase in taxable net income.

The Commission has instituted, at C. 11603, an inquiry and investigation into the rates of the South Pittsburgh Water Company, and, at C. 12590, a similar inquiry with respect to Whitaker Water Company. In these proceedings a determination will be made by the utilities or by the Commission of the original cost of the utilities' property. The utilities' original cost studies have not been completed and therefore are not available for consideration by the Commission within the time fixed in the commitment by the proposed purchasers of the securities which are the subject of the Securities Certificates herein discussed. However, using such original-cost and estimated original-cost figures as are of record, we find the capitalizable value

of the utility's assets to be $9,987,635.14, computed as follows:

Historical cost August 19, 1904, as estimated by the utility at C. 6257	$1,326,679.00
Net additions August 19, 1904 to Sept. 30, 1925	4,274,902.68
Net additions Sept. 30, 1925 to March 31, 1926	196,059.36
Net additions March 31, 1926 to Nov. 30, 1938	4,507,841.68
Subtotal	$10,305,482.72
Less depreciation (adjusted)	540,067.72
Estimated depreciated original cost of property now in use	$9,765,415.00
Plus:	
Materials and supplies	42,274.14
Allowance for working capital (representing four months' operating expenses exclusive of taxes and depreciation)	179,946.00
Capitalizable value of assets	$9,987,635.14

Against this capitalizable value of $9,987,635.14 the proposed capitalization will consist of the following securities:

First mortgage 3-¾% bonds	$7,500,000
Preferred stock	1,198,950
Common stock (330,000 shares $10 per share)	3,300,000
Proposed capitalization	$11,998,950

It will be observed that after the proposed refinancing shall have been effected, the utility apparently will be overcapitalized by approximately $2,000,000. Moreover, the ratio of bonds to be outstanding to the estimated depreciated original cost of property will be approximately 76 per cent.

The proposed ratio will be reduced continuously in the future, for the mortgage provides that annual depreciation accruals shall be (1) invested in plant additions and betterments, or (2) used for the retirements of bonds, or (3) segregated in a cash fund to be used only for purposes (1) and/or (2).

[4] The earnings of the utility for the twelve months ended November 30, 1938, after deduction for depreciation, were 2.7 times the proposed fixed charges on the new bonds. This is a satisfactory ratio.

[5] The unamortized discount and expense on the presently outstanding bonds, which amounted to $476,179 at November 30, 1938, will be amortized over what would be the remaining life of the presently outstanding bonds if they were not to be redeemed. This accounting treatment is satisfactory.

[6] The proposed overcapitalization of $2,000,000 is not, in our opinion, a bar to the registration of the Securities Certificates, for the following reasons:

1. Of the utility's present and proposed capitalization, $3,300,000 is and will be represented by common capital stock, all of which is owned by a holding company. From one point of view, the common stock may, therefore, be disregarded in determining whether or not the utility is and will be overcapitalized, for whatever par value may be assigned to the common stock, the holding company's equity in the utility remains unchanged.

2. To correct the overcapitalization the utility has formally stipulated that: "If the original cost of its property, plant, and equipment, when such original cost studies are completed, shall be less than the amount at which such property, plant, and equipment is recorded on its books, the utility, at its option, will":

1. Reduce the par value of common stock and/or its surplus account by an amount of such difference, or

2. Adopt a program for the amor-

tization of such difference over a period of years to be determined by agreement of the utility with the Commission, or

3. Provide for such difference by a combination of the methods set forth in (1) and (2) above.

[7] Securities Certificates Nos. 83 and 84 will be registered, and the application of South Pittsburgh Water Company for approval of the sale of 55,000 shares of its common capital stock to American Water Works and Electric Company, Incorporated, an affiliated interest (A. 56670) will be approved, for the following reasons:

1. The utility has committed itself to a satisfactory program for the further reduction of the bonds-to-property ratio and for the bringing of the total amount of its capitalization into line with the original cost of its property.

2. The refinancing will reduce the annual fixed charges by an amount in excess of $100,000.

3. The refinancing will effect a reduction of $57,576.68 in the amount of outstanding obligations.

[8] The city of Pittsburgh was represented at the hearing held on March 3, 1939. The city offered no evidence but, after the hearing, the city's committee on public service and surveys authorized the department of law to oppose the present applications for the reason that "the city of Pittsburgh has in contemplation legislation looking toward the condemnation of the properties of these two water companies in the city of Pittsburgh," and for any other valid reasons.

On March 13, 1939, the Commission received a letter from the department of law of the city of Pittsburgh advising the Commission of the above resolution, and stating in addition that the applications should be refused unless their approval will result in the immediate reduction of rates. The city again made no offer to submit evidence supporting its position; in fact by a subsequent letter, the city agreed that no further hearing need be held.

On March 21, 1939, Pittsburgh city council telegraphed requesting us to delay action on this merger pending action by the council upon a resolution authorizing condemnation proceedings by the city of Pittsburgh against St. Clair Water Company. Approval of the merger will not prejudice condemnation proceedings by the city of Pittsburgh. Greensburg v. Westmoreland Water Co. (1913) 240 Pa. 481, 87 Atl. 995.

As stated above, the Pennsylvania Public Utility Commission, upon its own motion, has already instituted inquiries into the reasonableness of the rates and charges made by the South Pittsburgh Water Company and the Whitaker Water Company (C. 11603, C. 12590). These investigations are entirely apart from the determination of the present applications, and will continue.

It will thus be seen that the protests and objections made by the city of Pittsburgh do not concern, except very indirectly, the precise question here involved, namely, whether South Pittsburgh Water Company should issue certain securities, or whether the smaller companies should be merged with it. The Commission is mindful of the statements made in the case of Brookville v. Public Service Commission, 102 Pa. Super. Ct. 503, P.U.R. 1931E, 157, 157 Atl. 513, affirmed

1932) 307 Pa. 194, P.U.R.1933A, 0, 160 Atl. 856. In that case a complaint against the rates of the Solar Electric Company had been made by the borough of Brookville and had been pending for some years. All the capital stock of the Solar Electric Company was owned by a holding company, which also owned the entire capital stock of the Pennsylvania Electric Company. The book value of the Solar Electric Company's assets was approximately $190,000, while the total of assets on the balance sheet of the Pennsylvania Electric Company was approximately $85,000,000. During the pendency of the rate case against the Solar Electric Company, an application was filed to permit the Pennsylvania Electric Company to acquire the former by purchase. The borough of Brookville, which the Solar Electric Company supplied with electricity, opposed this proposed sale. The Public Service Commission granted the application but, on appeal, the superior court reversed this order. The court stated that the public interest might be adversely affected if the consideration paid for the property of Solar Electric Company grossly exceeded the true value, and "the record was silent as to whether the price was fair or exorbitant"; that, under the circumstances, it would be difficult for the borough to proceed with its rate case after the smaller company was absorbed by the larger, since the property and operating expenses of the smaller company could not be easily discovered after its existence ended. The court, *supra*, at p. 160 of P.U.R.1931E, stated:

"We do not hold that the filing of a complaint against the rates of one of the companies involved, subsequent to an application for a merger would *necessarily* delay the approval thereof, unless it appears that the rate proceeding was brought in good faith and on reasonable grounds, *and that the proposed merger would substantially affect it.* Nor do we intimate that the present rates are unjust and unreasonable, but, in view of the various proceedings dealing with the supplying of electricity in the borough of Brookville, which have been vigorously contested, and of the financial matters to which we have referred, we feel that it is only just and proper that the Commission should have disposed of the rate case, *which is so intimately related to the present proceeding,* before approval of the sale of the property and franchises of the Solar Electric Company to the Pennsylvania Electric Company, and that proof should have been made that the assumption of the debts was a fair and reasonable consideration."

The views of the superior court were affirmed by the supreme court.

The facts in the above case differ from the present situation. In the first place, the rate case now pending is directed against South Pittsburgh Water Company, the larger of the companies involved in the merger, and the company which will survive the merger. South Pittsburgh Water Company has assets with a book value of about $13,400,000, which amount includes $2,000,000 representing assets of Chartiers Valley Water Company. The corresponding figure for Whitaker Water Company is $20,000. In the Solar Electric Company Case the rate investigation was against the smaller of the companies, and the one

intended to disappear. In the present case there will not be the difficulty referred to by the superior court in tracing the value of the company against which the rate proceeding is directed.

Second, the acquisition of the smaller companies will not affect the rates charged by the larger company in the way that it was feared the Solar Electric Company's rates would be affected. The companies to be absorbed here are not merely owned by the same holding company (as was true in the Solar Electric Company Case); here the South Pittsburgh Water Company owns directly all the capital stock of the Chartiers Company, and actually operates, under a lease which will not expire until 1995, the property which it now proposes to buy. As we have already stated above, the present applications are merely a simplification of corporate structure, and the only effect on the actual operation of the properties will be to reduce fixed charges by a definite sum each year. Moreover, since South Pittsburgh Water Company now carries its investment in Chartiers Valley Water Company under its Fixed Capital Account, the merger will not increase the value of South Pittsburgh Water Company's property for rate purposes.

Under these circumstances, we cannot find that the proposed merger will adversely affect or in any way hinder the city of Pittsburgh, either in condemning the properties or in participating in the rate case instituted by the Commission. As far as condemnation is concerned, the city states merely that it proposes, at some future time, to seek legislation looking toward that purpose. When that time arrives our approval of the issuance of the proposed securities and our approval of the proposed mergers will not in any way preclude any court, the Commission, or any other fact-finding body from fixing a different value on the property for the purposes of condemnation, or for the determination of reasonable rates.

For these reasons, we hold that the protests of the city of Pittsburgh must be disregarded at the present time, without prejudice, of course, to any action which it or which the Commission itself may take in the future.

The matters and things involved in Securities Certificates Nos. 83 and 84 and in Application Docket Nos. 56667, 56668, 56669, and 56670 having been duly presented and heard, and full consideration thereof having been had, we find and determine that Securities Certificates Nos. 83 and 84 should be registered and that the applications at Application Docket Nos. 56667, 56668, 56669, and 56670 should be approved, subject to appropriate conditions; Therefore,

Now, to wit, March 22, 1939, it is *ordered*: That Securities Certificates Nos. 83 and 84, in the matter of the issuance by South Pittsburgh Water Company of its first mortgage bonds, series A, 3¾ per cent, due March 1, 1964, and its common capital stock, of a par value of $10 a share, be and are hereby registered, subject to the following conditions:

First: That accruals for depreciation shall be used for the purposes and in the manner recited in the indenture of mortgage, and that the utility shall report to the Commission at intervals of one year beginning February 1, 1940, the amount of cash

which shall have been expended from said accruals for (1) additions or betterments to plant and/or (2) retirement of outstanding bonds.

Second: That the utility report to the Commission, not later than December 31, 1939, the progress made with respect to the determination of the original cost of its property.

It is *further ordered:* That the sale by South Pittsburgh Water Company to American Water Works and Electric Company, Incorporated, an affiliated interest, of 55,000 shares of its common capital stock of a par value of $10 a share, for a consideration of $550,000, payable in cash, be and is hereby approved.

It is *further ordered:* That the sale of all the franchises and property of St. Clair Water Company to Chartiers Valley Water Company, under the terms and conditions of a certain agreement between said two companies, dated February 6, 1939, the sale of all the franchises and property of Chartiers Valley Water Company to South Pittsburgh Water Company, under the terms and conditions of a certain agreement between said two companies, dated February 6, 1939, and the sale of all the franchises and property of Whitaker Water Company to South Pittsburgh Water Company, under the terms and conditions of a certain agreement between said two companies dated February 6, 1939, be and are hereby approved, and that certificates of public convenience issue in evidence of such approval, subject to the following conditions:

First: That the approval hereby given is not to be understood as requiring the Commission, in any proceeding that may be brought before it for any purpose, to fix a valuation on said property and franchises equal to the amount of consideration to be paid therefor, or equal to any value placed or to be placed thereon by petitioners, or to approve or prescribe rates sufficient to yield a return on the amount of consideration or an any said value.

Second: That South Pittsburgh Water Company debit $175 to Corporate Surplus Unappropriated Account in respect of said amount to be deposited in trust for payment to the holders of minority shares of the capital stock of Chartiers Valley Water Company.

NEW YORK COURT OF APPEALS

Fred Fisher

v.

Long Island Lighting Company

(— N. Y. —, 19 N. E. (2d) 682.)

Service, § 220 — Discontinuance — Electricity.

1. That a customer so tampered with an electric company's equipment that the current used was not recorded by meter did not warrant the company's discontinuing service without first giving the 5-day written notice as required by statute, p. 251.

Service, § 220 — Discontinuance — Statutory construction.

2. A statute which forbids an electric company to discontinue its service for any cause until after it has given the customer affected thereby a written notice cannot properly be construed to mean "for any cause other than criminal or fraudulent conduct on the part of the consumer," p. 251.

(HUBBS, J., dissents.)

[February 28, 1939.]

APPEAL *from judgment for defendant in suit against electric company to recover penalty by reason of defendant's failure to furnish service, to recover amount paid under protest, and compensation for loss of use and occupation of his home while the current was off; reversed and new trial granted. For lower court decision, see 254 App. Div. 866, 25 P.U.R.(N.S.) 115, 4 N. Y. Supp. (2d) 929.*

APPEARANCES: Jacob Leiman, of New York city, for appellant; Philip Huntington, of Glen Cove, for respondent.

LOUGHRAN, J.: The defendant Long Island Lighting Company, a public service corporation, supplied electric current in the home of the plaintiff at Bellemore, Long Island. On March 26, 1936, this service was cut off by the company without advance notice. Three months later the plaintiff paid, under protest, a bill of $181 "for unmetered current" and thereupon the service was renewed.

The company is subject to the Transportation Corporations Law

(Consol. Laws, Chap. 63). At the time here in issue, § 15 thereof provided: "If any person supplied with gas or electric light by any such corporation shall neglect or refuse to pay the rent or remuneration due for the same . . . such corporation may discontinue the supply of gas or electric light to the premises of such person. . . . But the supply of gas or electric light shall not be discontinued *for any cause* until and after a 5-day written notice, either personally or by registered mail, has been given to such person." Laws 1935, Chap. 481. (The italic is ours.) For breach of this last provision, plaintiff demands of the company the penalties imposed by § 12 of the statute, restitution of the sum he paid to it under protest, and compensation for loss of use and occupation of his home while the current was shut off.

[1, 2] The jury was charged that the company was bound to give the statutory notice and that its failure to do so made it answerable to the plaintiff for his consequent damages. Despite the company's concession that no notice had been given, the verdict was in its favor. Doubtless the reason was that the jury credited the company's defense that its equipment in the plaintiff's home had been so tampered with that current used was not recorded by the meter. We think this defense had no warrant in the foregoing text of the former § 15 of the statute.

From the premise that "It could not have been the intention of the legislature to protect the consumer in the right to commit larceny," the appellate division concluded that "It is proper to interpret this statute as though it read 'for any cause other than criminal or fraudulent conduct on the part of the consumer.'" (1938) 254 App. Div. 866, 25 P.U.R.(N.S.) 115, 116, 4 N. Y. Supp. (2d) 929, 931. In our opinion, no such departure from the letter of the law was called for. We discern nothing whimsical or vicious in the unqualified command of this statute that a gas or electric corporation was not to discontinue the supply of gas or electric light before it gave a 5-day written notice to the consumer. Perhaps that policy in the long run did justice all around. In any case, we find ourselves unable to say that common sense or moral principle necessitated an allowance to such corporations of fuller rein in passing judgment on their patrons.

The judgments should be reversed and a new trial granted, with costs in all courts to abide the event.

Crane, C. J., and Lehman, O'Brien, Finch, and Rippey, JJ., concur.

Hubbs, J., dissents.

Judgments reversed, etc.

MAINE SUPREME JUDICIAL COURT

Eastport Water Company

v.

J. W. Raye et al.

(— Me. —, 4 A. (2d) 841.)

Rates, § 240 — Schedules — Maximum charges — Procedure.

1. Reinstatement by the court of a former maximum charge custom cannot be considered where a new rate schedule, not providing for a maximum, has been filed with and made effective by the Commission pursuant to the Public Utilities Law, p. 253.

Rates, § 240 — Filed schedules — Controlling effect.

2. A water company can recover for water supplied to customers at rates duly filed with the Commission pursuant to statute, and such charges are not limited to the maximum charge which was in effect prior to the enactment of the statute but not included in the new rate schedule, p. 254.

[March 18, 1939.]

ACTIONS *for water service furnished by plaintiff company came up on report from superior court; judgment for plaintiff.*

Argued before, Dunn, C. J., and Sturgis, Barnes, Thaxter, Hudson, and Manser, JJ.

APPEARANCES: Merrill & Merrill, of Skowhegan, for plaintiff; Jonah & McCart, of Eastport, for defendants.

BARNES, J.: These four actions are for water service furnished the several defendants by the plaintiff company and come up on report from the superior court. Plaintiff, a public service corporation, was supplying water to residential customers, such as these defendants, prior to the enactment of the Public Utilities Law, Chap. 129, P. L. 1913, now Chap. 62, Rev. Stats. of Maine, a law that became effective, after referendum to the people, in 1915, and so continuing to this date.

Before the enactment of the said law, plaintiff charged for the use of water on a fixture charge basis, with a maximum rate of $25 (yearly) for a single family dwelling house in which there were fixtures to aggregate a total of $25 or more.

At this time there was in Maine no

Public Commission having control of rates, tolls, or charges of a water company serving the general public.

After the effective date of the Public Utilities Law companies such as the plaintiff were required to file with the Commission all their existing rates, the law providing that the only method of subsequently changing such rates was by filing proposed new rates; and that upon such filing of proposed new rates either the Commission or interested parties might object to changes; or, if change in existing rates were desired in a particular field the same could be sought by public complaint against the utility, filed with the Commission. In cases where no protest was raised before the Commission, rates filed became the effective rates of the company.

In the original enactment provision was made for the filing and fixing of rates of a going concern, as follows: "Every public utility shall file with the Commission within a time to be fixed by the Commission, schedules which shall be open to public inspection, showing all rates, tolls, and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it or in conjunction therewith. The rates, tolls, and charges shown on the schedules first to be filed shall not exceed the rates, tolls, and charges which were in force on January 1, 1913, except that the rates, tolls, and charges of utilities under the jurisdiction of the Interstate Commerce Commission, shown on the schedules first to be filed, shall be the rates, tolls, and charges in force when this act goes into full effect." P. L. 1913, Chap. 129, § 19.

Subsequent to the act becoming law, plaintiff filed its first schedule of rates, which contained no mention of maximum charge allowance, but in all other particulars the filed schedule was in accord with requirements of law. Whether failure to file statement of maximum charge of $25 per year was accidental or no, such charge was continued, in subject cases, till September 1, 1935, when plaintiff duly filed and placed in effect the rates as contained in its schedule in accordance with which items were charged and collection is sought by appropriate writs now before us, for water service, less credits given and "allowance for vacancy," if any; J. W. Raye, September 1, 1935, to February 28, 1937, $33; Henry Malloch, September 1, 1935, to February 28, 1937, $15.84; Grace Malloch, December 21, 1935, to August 31, 1937, $45.21; Harold Stackhouse, September 1, 1935, to February 28, 1937, $13.50.

[1] After a schedule of rates is made effective by the Commission, § 30 of said Chap. 62, Rev. Stats. makes it unlawful, as applied to cases such as here at bar, for any public utility to charge, demand, collect, or receive a greater or less compensation for any service performed by it or for any service in connection therewith than is specified in such printed schedules as may at the time be in force, or to demand, collect, or receive any rate

toll or charge not specified in such schedules, and the rates, tolls, and charges named therein shall be the lawful rates, tolls, and charges until the same are changed as provided in said chapter.

Request for reinstatement of a former maximum charge custom cannot be considered.

Such practice is prohibited by law.

[2] Finally, it being agreed in the report of the cases, "that the charges made for water furnished the defendants are in accord with the schedule of rates of the plaintiff company duly filed and promulgated in accordance with law and in effect for the period in which said water was furnished, unless said charges are limited to the maximum quarterly charge hereinbefore set forth," we find for the plaintiff in each case, and for the several sums respectively as above set out.

So *ordered*.

INDIANA SUPREME COURT

Northern Indiana Telephone Company

v.

United Telephone Companies, Incorporated

[No. 27155.]

(— Ind. —, 19 N. E. (2d) 940.)

Injunction, § 32 — Service denial — Telephones.

The facts are not sufficient to justify an order restraining a telephone company for discontinuing services over a certain line until final hearing before the Commission where there was no question of discontinuance of service involved but merely a question of the route over which messages shall be transmitted, and where the injured party had an adequate remedy at law for injuries sustained by loss of toll calls through an accounting.

[March 29, 1939.]

APPEAL *from order restraining telephone service over certain line pendente lite; reversed with instructions to dissolve restraining order and enter judgment for defendant.*

APPEARANCES: Gilliom & Gilliom, of Indianapolis, and Donald R. Mote, of North Manchester, for appellant; McHale, Arthur & Myers, of Logans-

port, Bowser & Bowser, of Warsaw, and Merl M. Wall, of Indianapolis, for appellee.

FANSLER, J.: The appellant, whose principal office is at North Manchester, operates a telephone system extending into a number of counties, and operates numerous exchanges, including a local exchange in the town of Claypool. Just before this action was commenced the appellant completed the conversion of its Claypool exchange from manual operation to automatic operation, thereby eliminating the necessity for manual switchboard operators at that exchange. The appellee, whose principal office is in Warsaw, operates a telephone system extending into a number of counties. For a number of years the appellant's manual switchboard at Claypool and the appellee's manual switchboard at Warsaw had been connected by means of a metallic toll circuit consisting of two wires. This line, for a distance of about one mile from Claypool, is owned by the appellant, and the remainder is owned by the appellee. There are several other connections by which toll messages can be routed from appellee's Warsaw switchboard to Claypool via North Manchester and other points. It is impossible to route messages from the appellee's Warsaw exchange directly to appellant's Claypool exchange without maintaining manual operators at Claypool, which are otherwise unnecessary, except by installing an automatic switching connection in the appellee's Warsaw office connected directly with the Claypool automatic exchange.

When the appellant requested the appellee to route toll messages from Warsaw to Claypool over routes other than the direct metallic line referred to, in order that appellant might dispense with operators at the Claypool manual switchboard, appellee brought this action to enjoin appellant from discontinuing service over this line, and, upon the hearing, the appellant was restrained from severing or disconnecting the direct metallic circuit, and from interfering with the continued use of the same by the appellee as it then existed, "until a final hearing of this cause or until the plaintiff (appellee) using due diligence, final action is taken with reference to said matters by the Public Service Commission of Indiana." From this order the appellant has appealed.

Appellant contends that the question involved is one of service, and that courts of equity have no jurisdiction to issue restraining orders or injunctions in such cases. They rely upon Vincennes v. Vincennes Traction Co. (1918) 187 Ind. 498, 120 N. E. 27. But it is unnecessary to consider the question of whether there may be instances in which courts of equity may intervene to prevent a discontinuance of service.

In this case there is no question of discontinuance of service involved. There is only the question of the route over which messages shall be transmitted. Under the arrangement between the parties, the tolls for messages originating within the territory of either party are retained by the originating party, but where messages originate beyond the territory of the

parties, and come through the exchanges of one of the parties to the other, the proportion of the toll collectible by the parties is divided in proportion to the length of the lines of each party used in transmission of the message. It appears therefore that the appellee's complaint is that, by routing messages which originate outside of its territory, but come through its exchanges to Claypool over routes other than the joint metallic circuit referred to, the appellee will receive a less proportion of the toll charges than it would receive if those messages were routed directly over the joint metallic circuit. But these are mere matters of accounting, which may be adjusted from the records after the Public Service Commission has determined the proper method of routing messages, so that if injured the appellee clearly and undoubtedly has a completely adequate remedy. It is not claimed that the appellant was threatening to or intending to discontinue service by which messages could be deliveded over its system to the subscribers of the Claypool exchange. Since the parties are required to account to each other for tolls received in any event, delay until the Public Service Commission passes on the question will work no substantial injury. It is conceded by the appellee that the Public Service Commission has sole jurisdiction to determine the merits of the controversy, and it was stated in oral argument that the appellee has a petition for a determination of the question now pending before the Public Service Commission.

The facts were not sufficient to justify a restraining order.

Judgment reversed, with instructions to dissolve the restraining order and enter judgment for the appellant.

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Dodge Truck seats provide real "easy-chair" comfort. Wider windshields and windows give maximum vision. Ventilation through *both* cowl and windshield is another Dodge driver-comfort feature!

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Dodge gives you new dependability in vital units, too! The super-tough Amola Steel in Dodge axle shafts and springs, for example, was developed expressly to meet new and more severe requirements. No other steel is like it—no ordinary alloy steel can match Amola's amazing combination of hardness and toughness—it's your assurance of dependability and important savings on repairs.

And Dodge powers each truck model with a truck engine expressly designed to match the load capacity of the unit—to cut your gas and oil costs to the minimum that is possible with good performance.

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Industrial Progress

Selected information about manufacturers, new products, and new methods. Also news on personnel changes, recent and coming events.



Washington Water Power Plans $400,000 Expansion Program

WASHINGTON Water Power Co. expects to spend about $400,000 in expansion of its rural service. This summer, the company will construct 400 miles of line to serve rural residents of Lincoln and Adams counties. The new line will cost about $800 a mile.

Wisconsin Electric Power Wins Coffin Award

THE Wisconsin Electric Power Company was announced as the winner of the Charles A. Coffin Medal for 1938 for its outstanding contributions to the public and to the power and electric industry during the year.

Presentation was made by H. P. Liversidge at the annual meeting of the Edison Electric Institute. Accompanying the gold medal was a check for $1,000 to be given to the employees' welfare fund.

The committee, in determining the award to the Wisconsin Electric Power Company, was particularly impressed with the company's extremely notable record in all major fields of activity, including technical accomplishment, public relations, employee relations, efficiency of operation, financial management, and over-all operation.

C. R. Ogsbury New IBM Vice President

THE promotion of Charles R. Ogsbury to the position of vice president of International Business Machines Corporation has been announced by Thomas J. Watson, president of the company.

Mr. Ogsbury has been connected with the organization for 29 years, having joined a predecessor company of the present corporation in 1910 in Washington, D. C.

Mr. Ogsbury will continue to make his headquarters in the company's World Headquarters Building in New York.

Chevrolet "University" Opens

CHEVROLET'S sixth and largest Post-Graduate School of Modern Merchandising and Management, a "University" unique in industrial circles, opened recently in Detroit.

With a total enrollment of 32, including three men from foreign lands, the retail business management school began an eight-week course which will touch on every phase of automotive dealership operation. All students are sons or relatives of Chevrolet dealers.

Various department heads of Chevrolet's central office appear on the curriculum as lecturers and teachers. Included are Mr. Holler, Felix Doran, Jr., T. H. Keating, W. G. Lewellen, and J. E. Johnson, assistant general sales managers.

Subjects included in the curriculum include organization of territory, the Chevrolet product, principles of new and used car operation, car projections and distribution, service and mechanical operations, business management, advertising, and public speaking.

More than 150 young men already have graduated from the school.

Starts $100,000 Program

THE Public Service Co. of Indiana has begun a $100,000 program of rehabilitation of electric equipment in the New Castle, Ind., area. Officials said the entire distribution system would be reorganized and voltage increased from 2,300 to 4,000.

Plans for Heating & Ventilating Exposition Progressing

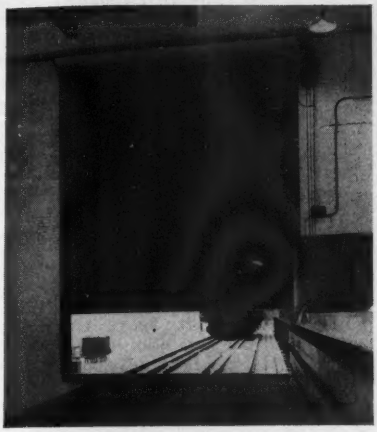
MORE than two-thirds of the total exhibit space for the Sixth International Heating and Ventilating Exposition to be held in Cleveland, January 22-26, 1940, has already been taken by exhibitors according to a recent announcement.

The Heating and Ventilating Exposition—the Air Conditioning Exposition—is held under the auspices of the American Society of Heating and Ventilating Engineers in conjunction with their annual meeting. The National Warm Air Heating and Air Conditioning Association will hold their national meeting at Cleveland during the same week, as will other organizations.

Principal classifications of exhibits for the Exposition at Cleveland include steam, air, and hot water heating, complete air conditioning, humidification and dehumidification, central heating, unit heating, fans, blowers, ventilating ducts, insulations, instruments, tools and shop equipment, electrical machines and accessories, metals and materials.

The Sixth International Heating and Ventilating Exposition will be under the personal direction of Mr. Charles F. Roth, president of the International Exposition Company. Permanent headquarters are at Grand Central Palace, New York.

TWELVE WAYS THEY SAVE



KINNEAR
ROLLING DOORS

If your service door equipment never had to be replaced or repaired . . . if it never held up traffic, or occupied usable floor or wall space . . . and could be opened and closed instantly and effortlessly every time – then you'd know those doors were saving you money – plenty of money. You can come mighty close to getting just that sort of door service with Kinnear Rolling Doors. And that's no idle claim – it's been proved, in hundreds of plants similar to yours, over a period of more than forty years! Let us send you complete details on these cost-cutting doors.

ALL STEEL CURTAIN REPELS FIRE – IS ALMOST WEARPROOF!

COILS COMPACTLY ABOVE THE OPENING

OPENS OUT OF REACH OF WIND AND TRUCKS

EFFECTIVELY COUNTER-BALANCED FOR SMOOTH, EASY OPERATION

VERTICAL OPERATION SAVES USABLE SPACE

RUGGED CONSTRUCTION DEFIES INTRUSION

INTERLOCKING SLATS ARE WEATHERPROOF!

CAN'T SAG, WARP, SPLIT, PULL APART!

HOT-DIP GALVANIZED TO RESIST RUST AND THE ELEMENTS

FLEXIBLE ASSEMBLY ABSORBS PUNISHMENT

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BACKED BY NATION-WIDE ORGANIZATION

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Factories: Columbus, Ohio and San Francisco, Cal.

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Transfer Posting Machine Added to IBM Line

A TRANSFER posting machine which transfers entire lines of typed or imprinted data, one at a time, from a master sheet to individual sheets or cards with absolute accuracy and at a speed of from 500 to 1,000 items an hour, has been added to its line of electric accounting machines by International Business Machines Corporation, according to a recent announcement.

Although particularly suitable for use in connection with journals and other lists of transactions prepared from punched cards on the company's high speed electric accounting machines, the transfer posting machine will also post data from master sheets prepared on the electric writing machine or an ordinary typewriter. Such master sheets or lists of transactions may be printed as a first carbon copy of regular reports, or originals to serve as regular reports after the posting operation, or as separate tabulating or listing operations. Two legible, fade-resistant and non-smudging postings may be made from each item on the master sheet, it was stated.

Central Illinois Light Co. Plans New Unit

PREPARATIONS are now being made by the Central Illinois Light Co. for the installation of a 35,000-kw. turbo-generator in its East Peoria plant to be completed in 1941, according to an announcement by R. S. Wallace, president.

The company recently completed and put into service an additional 25,000-kw. turbo-generator at the plant.

G-E Extends use of Silver Line Contacts

KNIFE switches down to and including 400 amperes in the General Electric line now have silver-to-silver line contacts as standard equipment, according to an announcement by the company's switchgear division. The new switches are designated Type LP-101, and supersede Type LP-1 which did not have such line contacts.

Drilling dimensions and general appearance of both types remain the same and the switches are therefore interchangeable and suitable for "match and line up."

A. G. A. E. M. Plans for Increased Promotion

A THREE-DAY series of meetings was held by the product divisions and sales committees of the Association of Gas Appliance and Equipment Manufacturers in Cleveland, June 27th-29th, to plan for increased national promotion and advertising of gas appliances.

The opening meeting was that of the gas water heater division. A. P. Brill, president of the Ruud Manufacturing Co., of Pittsburgh, Pa., and chairman of the division, presided. A detailed analysis was made of the current national promotion campaign which this division is projecting for the sale of automatic gas water heaters.

The general policy committee of the Association of Gas Appliance and Equipment Manufacturers was held under the chairmanship of H. N. Ramsey, president of the Welsbach Company, of Gloucester City, N. J., to consider ways and means of uniting the gas appliance industry more closely in its promotional activity.

Fall plans for "CP" gas range promotion were discussed by the "CP" sales management committee. Alan Tappan, vice-president of the Tappan Stove Co., of Mansfield, Ohio, presided.

The various groups of the Association's gas house heating and air-conditioning equipment division met under the chairmanship of H. P. Mueller, president of the L. J. Mueller Furnace Co., of Milwaukee, Wis. Special attention was given to the latest developments in the field of gas air-conditioning, and discussions centered around the promotion of these appliances.

Following the general session attended by all the division's product groups, individual meetings of these groups were held. The groups are: gas boiler group; gas furnace group, and the gas conversion burner group.

New Valve Bulletin Issued

MERCO Nordstrom Valve Company have recently issued a 12-page bulletin—No. V-129—describing their new Nordstrom flexible coupling valves.

Copies may be secured direct from Merco Nordstrom Valve Company, 400 North Lexington Street, Pittsburgh, Pa.

ZENITH ELECTRIC CO.
Automatic Control Equipment
Magnetic Switches—Time Switches
Program Clocks—Automatic Timers
Special equipment made to your specifications.
603 So. Dearborn St. Chicago, Ill.

ELECTRIC HEATING EQUIPMENT THAT WILL HELP YOU SERVE THE PUBLIC BEST
Designing, Engineering, Manufacturing of Electric Heating Units for Industrial Purposes.
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Overhead Construction Materials
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Mention the FORTNIGHTLY—*It identifies your inquiry*



A set-up for meeting special requirements in strand

WHEN special characteristics are required in strand, the place to begin is at the open-hearth furnace. The complete integration of all manufacturing operations under Bethlehem's system of control, beginning with steel making and following through all subsequent phases, is an important factor in making strand to meet special conditions.

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No item was overlooked securing the highest gr material for this fine bu ing. Therefore CRESCE ENDURITE HEAT RES TANT RUBBER COVER BUILDING WIRE was u because the owners reali that in this wire they wo receive maximum life a dependability, coupled w low cost.

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Bushings Externally Detachable!



NO NEED FOR TOOLS INSIDE TANK!

In a Pennsylvania distribution transformer, each lead is brought out through an individual bushing. The bushings are of wet process porcelain, each being individually bolted from the exterior! Thus there is no need to handle tools inside the tank. This pioneered Pennsylvania improvement not only affords greater convenience but greatly adds to transformer safety and further helps to keep maintenance costs at a minimum.

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No matter what kind of piping is involved, or where it is to be hung, you'll find a Grinnell Pipe Hanger *made for the job.*

Grinnell Hangers are built to eliminate problems in installation, with design and materials that assure long, trouble-free service. Adjustments to correct sagging lines and provide even weight distribution are made easily, quickly and accurately *after* the pipe is erected.

Write for your copy of Catalog, "Adjustable Pipe Hangers and Supports." Grinnell Company, Inc., Executive Offices, Providence, Rhode Island. Branch offices in principal cities.

ADJUSTABLE PIPE HANGERS BY GRINNELL
WHENEVER PIPING IS INVOLVED

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HELPS KEEP YOUR EQUIPMENT
WORKING AT LOW COST



can depend on J & L Gilmore Wire Rope to help keep your shovels, ts, drags and other equipment working efficiently, because it has the th, flexibility and abrasion-resistance to stand up under hard, uous service.

cisionbilt Gilmore Rope is made exclusively of J & L Controlled Quality — on the world's newest wire rope making machines, which work to a nce of 1-1000 of an inch.

en any of your earth-moving or material-handling equipment needs wire — or when you order new equipment — specify J & L Precisionbilt, the ou can depend on for safety and economy. Write today for your copy catalog on J & L Precisionbilt Gilmore Wire Ropes.



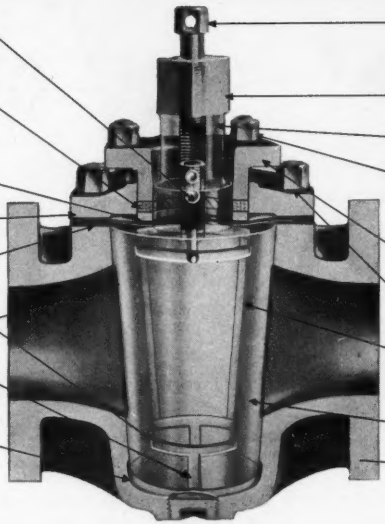
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REGULAR BOLTED GLAND TYPE

Designed for medium to high pressures. 150 to 1,000 lbs.

POINT 1—QUARTER TURN quickest to open or close.
POINT 2—SIMPLEST DESIGN Fewest parts. Nothing to clog.
POINT 3—"SEALDPORT" LUBRICATION Patented feature provides proper lifting of plug by positive pressure.
POINT 4—FULL-FLOATING PLUG Always easy to turn. Non-freezing.
POINT 5—POSITIVE PLUG SEAT Plug rides on pressure lubricant seat from which it is never separated.
POINT 6—NON-STICKING Powerful hydraulic force performs triple function—lifts plug to turn easily; lubricates and seals valve.
POINT 7—STREAMLINED FLOW Minimum resistance to line flow.
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POINT 9—UNEXPOSED LUBRICANT "Sealdport" lubr grooves in plug and body so arranged that line co cannot blow through when lubricant screw is remove
POINT 10—CHECK VALVES One or more ball chec shank.
POINT 11—SPECIAL LUBRICANTS Highly developed ricant and plastic materials in every consistency to specific needs for all variations of temperature and contents.
POINT 12—SPECIAL ALLOYS For every service, incl iron. Nordco steel, semi-steel, stainless steel, b Mercoloy, aluminum, nickel alloys, etc.

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MERCO NORDSTROM VALVE CO.

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International 1½-ton Model D-35 Truck is used by the New York City Fire Department as a maintenance truck for its telegraph system.

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Ask the International Truck dealer or nearby Company-owned branch to tell you how Internationals save money on loads like yours. Sizes range from Half-Ton units to powerful Six-Wheelers—42 models in 142 wheelbase lengths—for every hauling need.

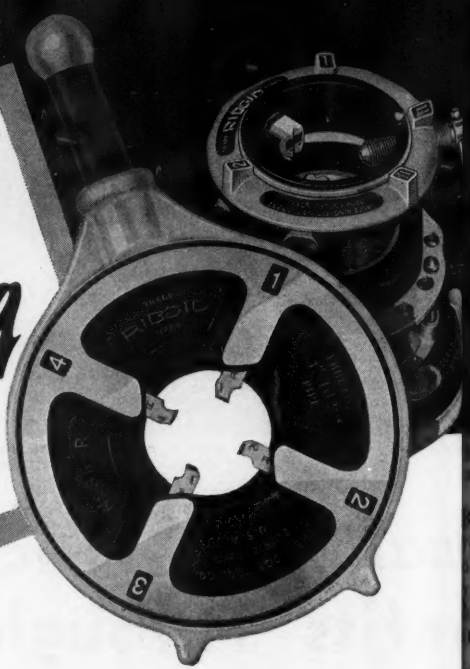
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Self-contained threaders, nothing to lose—no bushings; your choice of 2 speedy mistake-proof workholders, practically automatic. One set of chaser dies threads 4 sizes of pipe, 1″ to 2″—no extra dies to lug around or lose. Powerful new all-steel malleable-alloy construction. Faster, easier, lower cost threading—ask your Supply House.

THE RIDGE TOOL CO., ELYRIA, OHIO

RIDGID PIPE TOOLS

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We're Sold on Lumbermens Inspection Service and Their Dividends Have Saved Us 25% on Insurance Costs"



Here's Why Business Men are Turning to Lumbermens For Boiler and Machinery Insurance

Lumbermens offers the kind of boiler and machinery insurance that you want—reliable protection in a strong, legal reserve, mutual company and a fine inspection service by men of wide experience.

But more than that—Lumbermens gives you an opportunity to reduce the cost of this insurance substantially. Each year Lumbermens, a mutual company, has returned sizeable cash dividends to its policyholders.

Here are some facts you should consider before your present boiler and machinery insurance expires:

1. When you insure in Lumbermens you are protected by one of the largest and strongest casualty insurance companies in the world. Assets are over $30,000,000 and net cash surplus over $4,500,000.
2. Your equipment would be inspected by men who average more than 12 years of experience in that type of work . . . men who have been carefully selected by Lumbermens to provide such a superior inspection service that losses, even among the preferred type of policyholder that Lumbermens selects, may be reduced still further.
3. Lumbermens policy is broad and the initial rate you pay is standard.
4. Each year since organization, through war, panics and depressions, Lumbermens has paid its policyholders cash dividends. The present rate of dividend on boiler and machinery insurance amounts to 25% of the premium.

Find out more about these advantages. An inquiry on your letterhead will bring you more complete information about this service which may mean substantial savings to any utility property.

LUMBERMENS MUTUAL CASUALTY COMPANY

JAMES S. KEMPER, *President*

MUTUAL INSURANCE BUILDING, CHICAGO, U.S.A.

Save with Safety in the "World's Greatest Automobile Mutual"

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Insulated
PIPE UNITS

For underground steam lines, these 20-foot units are delivered completely assembled, including steam pipes, 85% asbestos insulation (or Ric-wiL Dry-paC Water proof Asbestos), Armco Ingot Iron "Hel-Cor" spirally corrugated and hermetically sealed conduit, and all accessories, ready for installation. Galvanized, asphalt-coated metal with strong lock seam shuts out water and deterioration. These Ric-wiL Units carry either single or multiple pipe lines, can be installed in shallow trenches with minimum labor cost, and make a highly efficient and durable system.



Write for complete catalog showing all Ric-wiL types.

● Armco experience indicates a reasonable life expectancy of 40 years in this type of conduit.

REG. U. S. PAT. OFF.

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CONDUIT SYSTEMS FOR UNDERGROUND STEAM PIPE

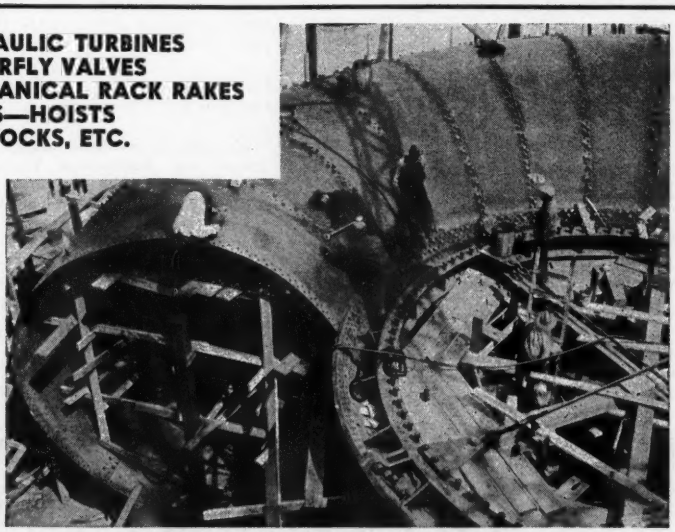
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CITIES Service engineers, backed by 77 years of practical lubrication experience, are concentrating their efforts daily on solving the various lubrication problems with which industry is faced.

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Diesel Engine Oils
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The accuracy and speed of the International Electric Accounting Method are proving ideal for all phases of public utility accounting work. By this modern method, entries are made as transactions occur. These entries are classified and reclassified mechanically, as often as necessary. No additional handling, posting or writing are required.

At the close of each accounting period, operating reports are prepared automatically. Special reports and analyses are also produced from the same media with accuracy and great speed.

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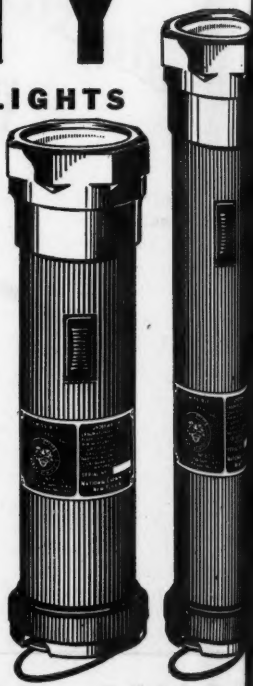
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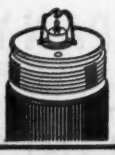
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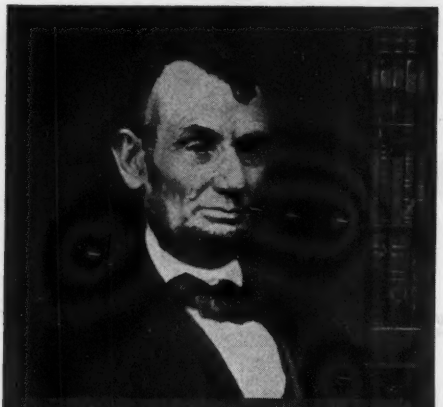
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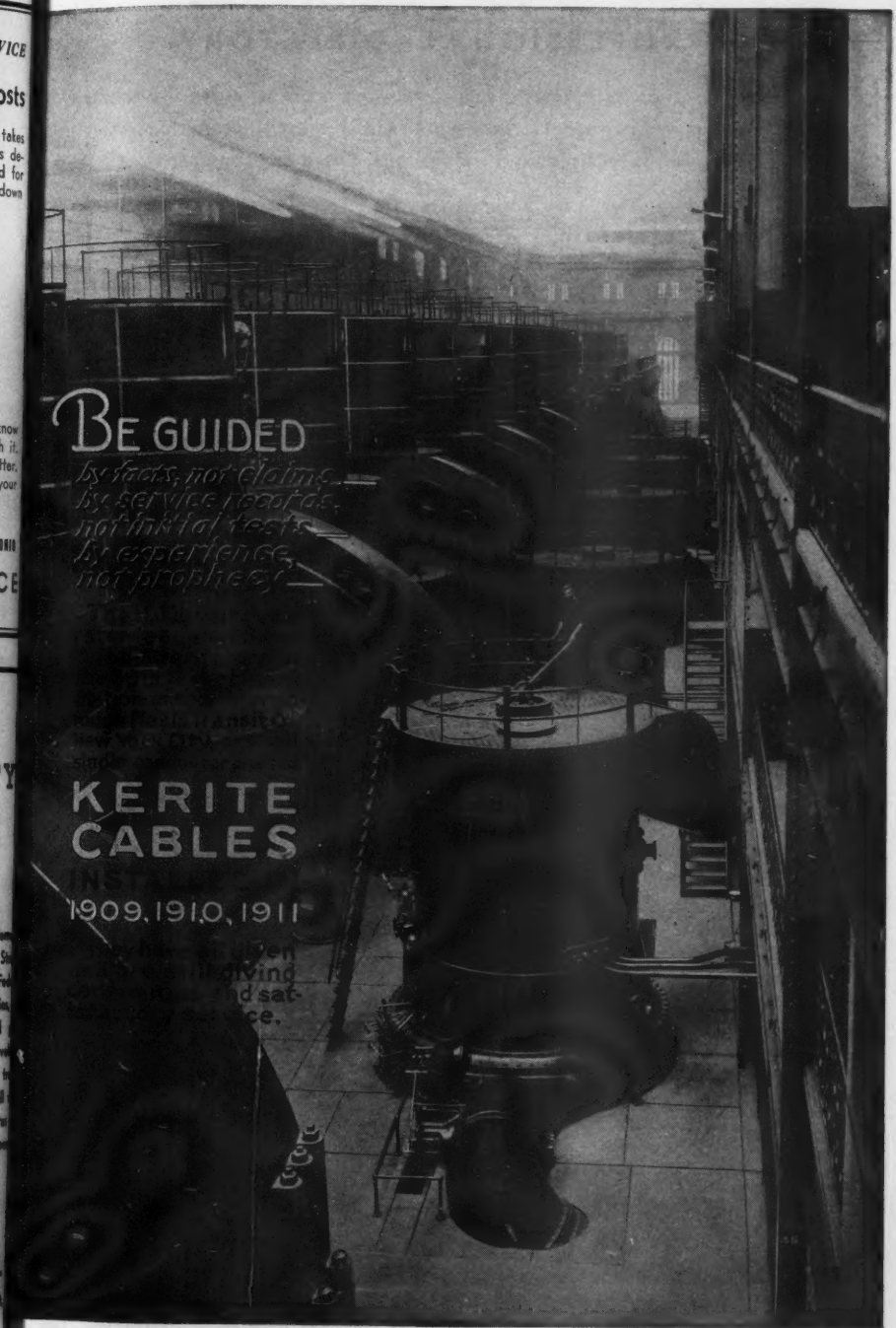
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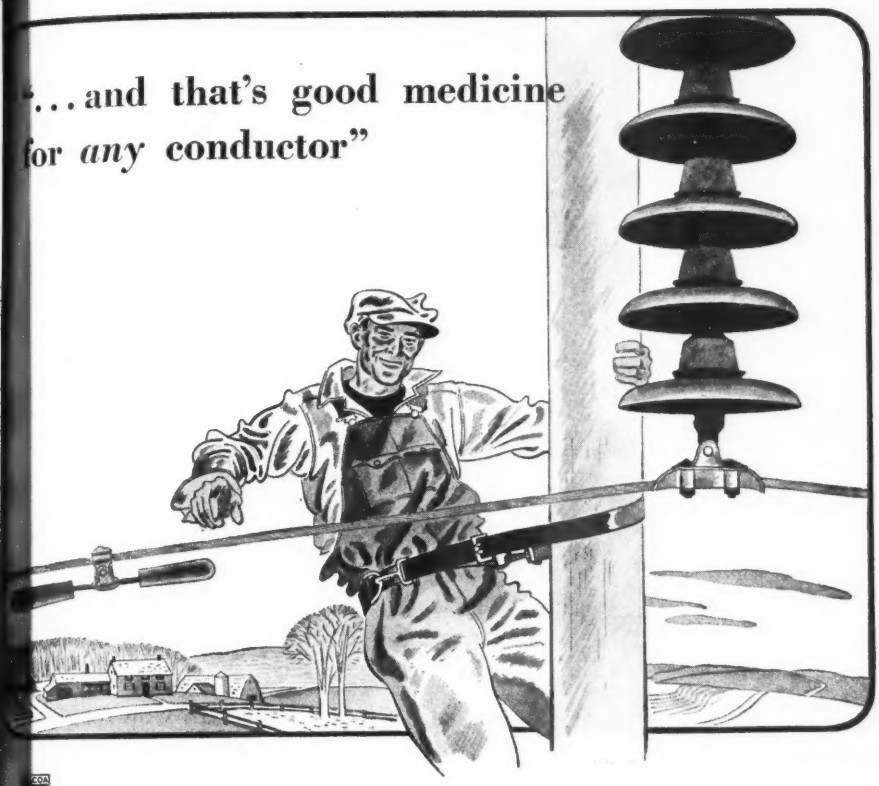
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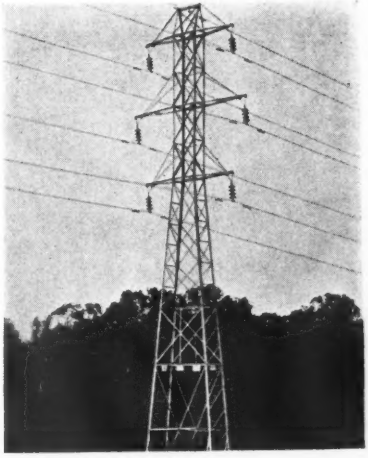
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